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SUMMARY OF HEARINGS BEFORE THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, ON THE IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT

PREPARED FOR THE USE OF THE

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

OCTOBER 1985

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LETTER OF TRANSMITTAL

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC, September 15, 1985.

Senator STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN THURMOND: This is to request your authorization to have printed, as a document of the U.S. Senate Committee on the Judiciary, a publication to be entitled "Summary of Hearings before the Senate Subcommittee on the Constitution, on the Impact of the Proposed Equal Rights Amendment." This publication, prepared by the Congressional Research Service of the Library of Congress, is designed to serve as a concise reference to the 11 days of hearings held during the 98th Congress on the impact of the Equal Rights Amendment. In particular, I wish to acknowledge the contribution of Ms. Leslie Gladstone of the CRS in this project. I believe that such a publication will prove extremely useful to Members of Congress and their staffs, as well as to the public, in providing convenient and authoritative access to this information. Thank you very much for your consideration of this request.

Sincerely,

ORRIN G. HATCH,
Chairman,
Subcommittee on the Constitution.

FOREWORD

During the 98th Congress, the Subcommittee on the Constitution of the Senate Committee on the Judiciary conducted 11 days of hearings on the impact of the proposed "Equal Rights Amendment." I hereby authorize the Subcommittee to publish its summary of those hearings, prepared in conjunction with the Congressional Research Service of the Library of Congress, to be entitled: *Summary of Hearings before the Senate Subcommittee on the Constitution, on the Impact of the Proposed Equal Rights Amendment.*

I am confident that this publication will provide Members of Congress, their staffs, and the general public a convenient and useful source for reviewing the extensive hearings that were held by the Subcommittee on the Constitution on the Equal Rights Amendment.

STROM THURMOND,
Chairman, Committee on the Judiciary.

LETTER OF SUBMITTAL

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC.

Hon. ORRIN G. HATCH,
Chairman, Subcommittee on the Constitution,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am pleased to submit the accompanying report, entitled "Summary of Hearings on the Proposed Equal Rights Amendment Held by the Senate Judiciary Subcommittee on the Constitution, May 1983–September 1984," which was prepared at your request by the Congressional Research Service. Of the eleven summaries in the report, nine were written by Leslie W. Gladstone and one by Jennifer D. Williams of the Government Division. One summary was written by Kathy DiPippa, Duncan Hollomon, Margaret M. McHugh, and Gloria P. Sugars of the American Law Division.

We hope that this report will be useful to the Committee on the Judiciary and other Members of Congress in their deliberations on the complex and sensitive issue of equal rights for women.

Sincerely,

ELIZABETH YADLOSKY
(For Gilbert Gude, Director).

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THE EQUAL RIGHTS AMENDMENT: AN OVERVIEW

INTRODUCTION

On May 26, 1983, the Senate Subcommittee on the Constitution received testimony from four witnesses regarding the meaning, purpose, and need for an Equal Rights Amendment to the Constitution.

Senator Paul E. Tsongas of Massachusetts spoke as the sponsor of the proposed amendment and stressed its importance with regard to the establishment of a standard for eliminating discrimination based on sex.

Marna S. Tucker, a Washington, D.C., attorney, favored the amendment as the most effective means of eliminating discrimination in law and custom.

Walter Berns, resident scholar with the American Enterprise Institute, opposed the amendment, saying that its meaning and potential impact were unclear and arguing that equal rights for women should be pursued through legislative remedies.

Representative Henry J. Hyde of Illinois opposed the amendment, arguing that it would strengthen rights to abortion and to abortion funding. He favored inserting language in the amendment specifying that the intent of the framers did not include expansion of abortion rights.

SUMMARY OF STATEMENT BY HON. PAUL E. TSONGAS, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator Tsongas spoke as a sponsor of the amendment, stressing its importance with regard to the establishment of a standard for eliminating discrimination based on sex.

NEED FOR THE AMENDMENT AND EXTENT OF SUPPORT

Passage of the ERA, one of the most important matters before the Congress, is necessary to serve equal justice for all American citizens. It has the support of a clear majority of Americans. When last before the Congress, it won a decisive majority. Today its sponsors number 57 Senators and 239 Members of the House of Representatives.

The need for an Equal Rights Amendment remains clear and compelling, despite recent setbacks. It would, for the first time, grant women full status as equal citizens under the Constitution and establish a standard for eliminating discrimination based on sex. Only a constitutional amendment can adequately assure equal rights for women and men and guarantee fair and equal opportunities in employment, education, benefit and retirement plans, marriage and divorce.

CONSTITUTIONAL VERSUS STATUTORY APPROACH TO EQUAL RIGHTS

Many opponents of ERA protest that their disagreement is based on tactics, not principle, and claim to favor a statutory approach rather than a constitutional one. One has to wonder about the genuine sincerity of those who say that they support thousands of individual, unconnected protections, but not a single overriding guarantee.

ISSUES RAISED BY THE AMENDMENT

Since its first introduction, controversy over the ERA has revolved around the same questions: Whether there should be room in the law for "reasonable" distinctions in the treatment of men and women; whether a constitutional amendment is the proper vehicle for improving the legal status of women; and how ERA might affect such areas as privacy, military service, domestic relations, labor legislation, and criminal law.

Despite increasing numbers of women in the workforce, women college graduates earn less than men with eighth grade educations. Women account for more than 40 percent of all white-collar jobs, but hold only 1 in 10 managerial jobs and 1 in 7 professional jobs. Despite equal credit laws, many women are still denied credit because of their sex. Many homemakers have no legal or economic status and little or no protection upon retirement or disability, and in many States, support laws, property laws, divorce laws, and inheritance laws discriminate against the homemaker.

EFFECT OF THE AMENDMENT

The ERA would have the effect of requiring the government to treat males and females equally as citizens and individuals under the law. It would not require that any level of government establish quotas for women or men in any of its activities; rather, it would simply prohibit discrimination on the basis of a person's sex. The amendment would apply only to governmental action; it would not affect private action or the purely social relationships between women and men.

Questions have been raised regarding the effects of the ERA in the areas of privacy, military service, marriage and the family, protective labor laws, and criminal laws relating to sexual offenders. Response to these concerns may be made as follows:

Right of privacy

According to ERA opponents, the adoption of the ERA may end legal separation of males and females in restrooms, prisons, and dormitories. However, the 1972 report of the Senate Judiciary Committee [1] states two legal principles that are especially significant. These are the (1) traditional powers of the State to regulate cohabitation and sexual activity by unmarried persons, which would permit the State to segregate the sexes in institutions, and (2) the constitutional right of privacy established by the Supreme Court in

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[1] U.S. Congress. Senate Committee on the Judiciary: "Equal Rights for Men and Women," Senate Report No. 92-689, 92d sess., Washington, DC, U.S. Govt. Print. Off., 1972, 52 p.

Griswald v. *Connecticut* (381 U.S. 479 (1965)), which would likewise permit separation of the sexes in such places as public toilets and sleeping quarters of public institutions.

Military service

The ERA would require Congress to treat women and men equally with respect to the draft, if a draft were reinstated. Both women and men who met physical and other requirements, and who were not exempt or deferred by law, would be subject to conscription. Women who are conscientious objectors, who are unqualified for medical reasons, who have dependents, or who are mothers with children would not automatically be subject to conscription, just as men in certain circumstances would be exempted.

Domestic relations

Under the ERA, State domestic relations laws would have an equal effect on males and females or be based on criteria other than sex. Child support required of each spouse, for example, could be based on factors such as earning power, current resources, and nonmonetary contributions to the family welfare. Laws governing alimony and custody of children could be similarly rewritten. The ERA would strengthen the family by strengthening the role of the homemaker and would guarantee a "partnership" in which marital property belongs to both husband and wife.

Labor legislation

Ratification of the ERA would result in equal treatment for women and men with respect to State labor laws. State statutes which bar women from certain occupations would be invalid. However, laws which offer benefits could be extended to protect both women and men, such as those providing rest periods for workers, minimum wage benefits, or health and safety protections.

Criminal law

The amendment would prohibit a State from providing for different punishments for women and men who commit the same crime. Laws which are limited to one sex would have to be extended to both, or such laws would become invalid. For example, prostitution laws would apply to the acts of both women and men.

Summary of Questions Directed to Senator Tsongas

Senator Tsongas was questioned by Senator Hatch regarding:

(1) The standard of review to be used by courts in judging cases of alleged sex discrimination;

(2) The role of the courts versus the role of Congress in resolving specific problems related to the amendment; and

(3) The impact that the amendment might have on certain specific areas of concern, including veterans' preference, abortion funding, private single-sex schools, religious practices, sex-based discrimination in insurance, fair housing, maternity and paternity leave, sex education, military service, seniority systems, homosexual marriage, the earnings gap, and privacy.

He was questioned by Senator Thurmond regarding the issue of amending the amendment, if ambiguities or weaknesses were found in its language or meaning.

(1) STANDARD OF REVIEW

Senator Hatch asked if sex would be equated with race under the amendment, i.e., would cases of alleged sex discrimination be reviewed under the strict scrutiny standard. Senator Tsongas responded that the courts would decide which standard to apply, adding that lack of this kind of specificity (regarding the standard the courts will use) should not be grounds for rejecting an amendment, since there is no precedent in history for such a predetermination.

(2) ROLE OF THE COURTS VERSUS THE ROLE OF CONGRESS IN RESOLVING SPECIFIC PROBLEMS RELATED TO THE AMENDMENT

Discussion of this issue arose repeatedly throughout Senator Hatch's questioning of Senator Tsongas. In summary, Senator Hatch said that he believed ambiguity and lack of clarity in the amendment regarding the standard of review were serious defects in the proposed amendments. Senator Tsongas, using the proposed Human Life Federalism Amendment [sponsored by Senator Hatch] to illustrate, asked Senator Hatch if he was suggesting that all constitutional issues should be decided prior to passage of amendments so that interpretation by the courts is unnecessary. He added that if Senator Hatch's rationale had been followed with earlier amendments, there would not have been an amendment providing for racial equality or any other amendments that have resulted in court cases. Agreeing that Senator Hatch's concern was legitimate, Senator Tsongas suggested that they work together to create a legislative history which would spell out the intent of Congress regarding certain issues.

Senator Hatch's responses to Senator Tsongas included the following points: that Congress, as an elected body, should determine how *anticipated* constitutional questions or ambiguities are to be resolved, rather than leaving all interpretation of the amendment to the courts, that the role of the courts is to resolve *unanticipated* questions. He added that the way in which the amendment is to be applied, e.g., regarding the standard of review, should be determined before passage, since it is virtually impossible to change an amendment after ratification. He also observed that a distinction between the ERA and the Human Life Federalism amendment was that the former would transfer decisionmaking from the elected, representative branches of Government to the judiciary, while the latter would be the reverse.

(3) IMPACT OF THE AMENDMENT ON SPECIFIC AREAS OF CONCERN

To illustrate his apprehension regarding the role of the courts in resolving certain issues, Senator Hatch questioned Senator Tsongas regarding the impact of the amendment on the following areas: veterans' preference, funding of abortions, public and private single-sex schools, certain sex-based practices of religious groups,

the use of sex-based actuarial tables by insurance companies, discrimination on the basis of marital status under fair housing codes, equivalence in maternity and paternity leave, sex segregation in sex education classes, military service, seniority systems, regulation of homosexual marriages, and the "earnings gap" between men and women.

In summary, Senator Tsongas replied repeatedly that the courts would probably have to resolve questions regarding these issues. He said that Senator Hatch was presenting a list of questions regarding issues that are ambiguous, that these are issues that would need to be resolved by the courts whether or not the ERA was ratified. He concluded by promising to submit detailed responses to the questions in writing.

Senator Thurmond asked if Senator Tsongas, as chief sponsor of the amendment, had explored the different aspects of the amendment and could express an opinion on the questions asked by Senator Hatch.

Senator Tsongas responded that the committee had a right to responses and that they would be forthcoming.

Senator Thurmond asked if Senator Tsongas would offer changes to cure any lack of clarity or weakness in the amendment, if his study of the questions revealed such problems.

Senator Tsongas said that he was not in favor of amending the amendment, that he would prefer to work out problems of interpretation and application in advance of passage, and that the possibility of later litigation regarding the provisions of the amendment should not preclude passage.

Summary of Statement by Marna S. Tucker, Attorney, Washington, DC

Ms. Tucker spoke in favor of an amendment as the most effective means of eliminating discrimination in law and custom.

LACK OF EQUAL STATUS FOR WOMEN

Women are still second-class citizens in virtually every economic and political sphere and are excluded from participation at many levels of society. Although some antidiscrimination legislation has been enacted, it is extremely fragile and can be effectively undermined if a particular administration, such as the present one, should decide to rewrite regulations that encourage equal opportunity. Passage of an amendment is necessary to affirm that our national commitment to equality for women is unequivocal and permanent. Neither the 5th nor 14th amendment guarantees of equal protection [2] under the law provide the assurance of equality women seek, because the Supreme Court refuses to view classifications based on sex as inherently suspect, as it does classifications based on race.

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[2] See *Bolling* v. *Sharp*, 347 U.S. 497 (1954), in which the Supreme Court said that, at least with respect to discrimination, there is the same equal protection guarantee implicit in the due process clause of the 5th amendment as in the equal protection clause of the 14th amendment.

NEED FOR AN AMENDMENT: ILLUSTRATIONS IN THREE AREAS

Although there exist many examples of the need for an ERA to guarantee equality for women, there are three areas—family law, employment, and education—with which every woman can identify and which are directly linked with the phenomenon of the "feminization of poverty."

In family law, institutionalized discrimination has contributed to the desperate economic condition of homemakers following divorce. Studies show that in the years following divorce, women's incomes drop an average of 73 percent while their husbands' incomes rise by an average of 43 percent. The causes of this disparity may be found in inadequate child support awards, unequal distribution of marital property, and insufficient arrangements for spousal support.

The experience in many of the 16 States with State ERA's, however, has shown that according legal recognition to the value of homemaker services insures economic protection and equity for homemakers. Under State ERA's, child support has been established as a mutual obligation of both parents, with economic value accorded to the custodial parent's nonmonetary contribution of child care and nurturing. In the distribution of marital property, State ERA's have been instrumental in equalizing each spouse's share of marital property at the time of divorce. Regarding spousal support, State ERA's have given married women, particularly those who are homemakers, a new basis for contesting arbitrary limits to a wife's right to support, such as the requirement that a wife receive less than half of her husband's earnings, despite her own needs. Thus, the extension of legal rights and benefits to both men and women, and the simulataneous removal of sex-based presumptions and burdens that have been triggered by State ERA's, have laid the foundation for a changing family law system that is more equitable and responsive to each family member's needs.

The issues in the areas of employment and education are interrelated. Women employed year-round to full-time jobs are paid an average of 60 cents for every dollar paid to similarly employed men. There are two principal reasons for this disparity: first, equal employment laws are inadequate and enforcement is insufficient, and second, our system of public education tends to deny women training for all but a handful of low-paying, dead-end "women's" jobs. Only an Equal Rights Amendment will insure equal educational opportunities, such as those provided by vocational education, training programs, and the military—opportunities from which women are now excluded, either by active discouragement or formal restrictions.

WHY AN AMENDMENT IS NEEDED

Discrimination against women is found throughout the fabric of our laws. Although women's organizations have achieved some success in eliminating discrimination by targeting specific laws, there are too many discriminatory laws for the task to be completed in the lifetime of any woman now living. The only way real progress can be made in insuring that the opportunities and rights of

women are equal to those of men is by the adoption of the Equal Rights Amendment.

WHAT AN AMENDMENT WOULD ACCOMPLISH

The ERA sets out firm principles that are as clear as any of the rights already existing in the Constitution—including "equal protection of the laws" and "due process of the law." Under our current law and the interpretation of cases under the 5th and 14th amendments, the position of women is far more ambiguous than it would be with an ERA, since the concept of equal protection has not been given uniform articulation by the courts. The ERA is designed to eliminate that ambiguity. It would give less discretion to the courts and would curtail judicial activism in this area.

SUMMARY OF STATEMENT BY WALTER BERNS, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

Mr. Berns spoke against passage of the amendment, due to a perceived lack of clarity regarding its meaning and potential impact. He urged that equal rights for women be pursued through legislative remedies.

PROGRESS IN EQUAL RIGHTS

All statutes, ordinances, and regulations that discriminate against women should be abolished. Much progress has been made since 1972, when the Congress first proposed the amendment in this form. Sixteen States have constitutional provisions similar to the proposed ERA. Title VII of the Civil Rights Act of 1964 has been used effectively to extend equal employment opportunity, and, in a handful of equal protection cases brought under the 14th amendment, the Supreme Court has invalidated State-based discriminatory provisions.

AMBIGUITY REGARDING THE AMENDMENT

The problem with the proposed Equal Rights Amendment is its ambiguous wording—there is no agreement as to its meaning. It speaks of equality of rights without identifying those rights. If adopted, it would be the only provision in the Constitution bestowing or protecting a right without identifying that right.

It might be said that identification is unnecessary, that the language is absolute and thus forbids all laws, Federal as well as State, that differentiate by sex. Yet the authors of that landmark article in the *Yale Law Journal*,[3] while saying that the constitutional "mandate must be absolute," also say that the amendment would permit laws taking account of physical characteristics unique to one sex and would permit laws resting on some other constitutional right, such as the right to privacy.[4] Thus, while insisting that the mandate must be absolute, they would permit exceptions which they call "qualifications."

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[3] Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman: "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," Yale Law Journal, vol. 80, April 1971, pp. 871–985.

[4] Ibid., p. 901.

Other supporters of the proposed amendment intend to make sex, like race, a suspect classification and therefore subject to a stricter judicial scrutiny. This implies that it is not necessary to know what the language means and that it is proper to delegate to the courts the authority to interpret it for us.

It is said that the courts will be guided by the "legislative history" of the proposed amendment. Yet what is being debated here is a constitutional provision, and the Constitution is not derived from the legislature. The Constitution has been described in *Federalist 78* as an expression of the people's will and it is the people, acting through their representatives in the State legislatures or in the State conventions, who adopt amendments. They ought to know what they are being asked to adopt.

Are the sponsors saying to the American people that they don't know whether this amendment will invalidate such institutions as a male-only draft, separate dormitories in colleges and universities, or separate junior high schools for boys and girls, or whether the courts will decide these questions? Are we saying that it is agreed that Congress is entitled to withhold financial support from schools that segregate on the basis of race, but we haven't made up our minds whether the ERA will require Congress to withhold financial support from schools that segregate on the basis of sex? Are we saying that the courts are already authorized to grant affirmative relief to remedy the effects of past racial discrimination, but we are not sure about benign sex quotas and are content to let the courts decide the question? Other questions could be asked about whether, under the amendment, the right of women to vote could be considered "diluted" (similar to that of racial groups) when the group is not sufficiently represented or whether a husband's interest in his wife's abortion would then be equal to hers in the event of a conflict over the question of abortion.

WHY A LEGISLATIVE APPROACH IS PREFERABLE

There is still work to be done in eliminating laws that discriminate against women, but that work does not require a constitutional amendment. All vestiges of discrimination can be eliminated by simple legislative enactment.

The Constitution is not a sexist document. Not one of its provisions had to be changed before a woman could serve in the House or Senate or on the Supreme Court, or would have to be changed to allow a woman to be elected President. Not one of its provisions had to be changed before women could vote.

This amendment should be labeled a judiciary act, an act extending the jurisdiction of the Federal courts. It would foster still more judicial activism.

SUMMARY OF QUESTIONS DIRECTED TO MS. TUCKER AND MR. BERNS

The questions explored possible interpretations of the amendment by the courts. Directing the inquiry principally to Ms. Tucker, Senator Hatch was concerned with:

(1) The standard of review to be applied by the courts in cases alleging sex discrimination under an Equal Rights Amendment;

(2) The method of analysis to be applied by courts under the amendment, e.g., whether the *intent* or the *impact* of a challenged statute would be analyzed to determine discrimination;

(3) The role of the courts versus the role of the Congress in resolving questions concerning the scope, meaning, and impact of the amendment; and

(4) The effect of an amendment on specific issue areas, such as affirmative action, military service, child care services, homosexual marriage, the treatment of women under Social Security, property law, and domestic relations law.

(1) STANDARD OF REVIEW

Senator Hatch asked whether, under the ERA, sex discrimination would be equated with race discrimination by the courts—in other words, Would sex be treated as a suspect classification under constitutional law? Ms. Tucker said that sex discrimination "most likely" would be treated under the same standard, i.e., strict scrutiny, as race discrimination, adding that the object of the ERA is to prohibit differentiation in legal treatment on the basis of sex. Responding to Senator Hatch's reference to sex as a suspect (or "absolute") classification Ms. Tucker noted that virtually all cases of statutory discrimination on the basis of race and national origin, considered by the courts as suspect classifications, have been struck down. Senator Hatch asked Ms. Tucker if she agreed with Professor Emerson [5] that, under the ERA, the standard of review would not be based on whether the alleged discrimination is reasonable or unreasonable and that the ERA must be interpreted as if sex were not a factor in determining legal rights. Ms. Tucker answered that Professor Emerson's article was written in 1971, before much of the present case law on sex discrimination was developed. She added that since 1971, there have been three different standards of review used by the Court in its rulings on sex discrimination and that it is time to make it clear that sex inequality is forbidden under the Constitution.

(2) METHOD OF ANALYSIS

Senator Hatch noted that under the 14th amendment the Supreme Court evaluates cases of alleged sex discrimination according to an *intent* analysis (where the intent of the challenged action is scrutinized), rather than a *results* or *disparate impact* analysis (where the impact or effect of an action is the critical factor). Discriminatory intent is considered more difficult to prove than discriminatory impact (which can be demonstrated by facts and statistical data, for example). Senator Hatch asked if a strict scrutiny standard of review would require an analysis of equality of intent or equality of impact. As an example of disparate impact, he noted that neutral employment tests involving physical requirements (a height requirement, for example) often exclude a large percentage of women. Senator Hatch asked if courts applying the strict scrutiny standard of review would require that equal numbers of men and women must pass such tests, or if strict scrutiny would simply

[5] See Brown, Emerson, Falk, and Freedman, in the Yale Law Journal, April 1971.

mandate equality of opportunity. Ms. Tucker answered that strict scrutiny would not require a statistical test, but would require proof that individual qualifications, rather than stereotypes, were considered.

Countering Ms. Tucker's statement, Dr. Berns said that ERA proponents disagreed on whether an analysis based on results or intent would be required.

(3) THE ROLE OF THE COURTS VERSUS THE ROLE OF CONGRESS IN RESOLVING QUESTIONS RELATED TO SCOPE, MEANING, AND IMPACT OF THE AMENDMENT

Dr. Berns stated that there were many questions, including the standard of review, that would have to be resolved by the courts under the proposed amendment and that he would prefer such questions to be resolved legislatively.

In response, Ms. Tucker said that courts are already deciding such questions and that the amendment would help reduce the amount of litigation and number of court decisions by providing a single standard of review to replace the several standards now employed.

(4) THE IMPACT OF THE ERA ON SPECIFIC ISSUE AREAS

Senator Hatch asked what the impact of the ERA would be on the following:

(a) Affirmative action

The relationship between standard of review and the constitutionality of affirmative action policies was discussed. Concerning the question of whether programs that favor one sex over another would be consistent with an Equal Rights Amendment, Ms. Tucker answered that the courts would look at such policies on a case-by-case basis and that the purpose of the policies—whether they were designed to eliminate or foster discrimination—would be a factor in a court's decision.

(b) Homosexual marriages

Ms. Tucker pointed out that challenges to laws forbidding homosexual marriages already have been brought under State equal rights amendments, which are worded identically to the proposed Federal amendment, and that such amendments have not permitted legalization of such marriages.

Dr. Berns disagreed, asserting that if race and sex discrimination were treated with equal strictness by the courts under the ERA, then laws preventing marriages between persons of the same sex might be judged unconstitutional on the same basis as laws preventing marriages between the races (which the Supreme Court has judged as unconstitutional; in other words, neither race nor sex could be a factor in preventing marriages).

(c) Child care services

Senator Hatch noted that some proponents of the ERA have argued that truly equal employment opportunity is not achievable for women until they are fully relieved of child-care burdens. He

asked whether the ERA would create a constitutional right on the part of individuals to secure the benefit of government-supported child care services. Ms. Tucker answered that the ERA does not create rights (as opposed to guaranteeing rights already implicit in the Constitution) and that child care is a separate issue.

(d) Treatment of women under Social Security

Regarding the question of whether the ERA would require a homemaker tax to insure that housewives or househusbands are treated fairly under Social Security, Ms. Tucker said that discrimination on the basis of sex would have to be eliminated in the Social Security program, but that she did not feel qualified to comment on the method (i.e., a tax) by which this change would be implemented.

(e) Property law

Senator Hatch asked Ms. Tucker if the ERA would render unconstitutional existing systems of property ownership that rely on proof of legal title or direct financial contributions (the common-law property concept), and whether the 40 or more States with common-law property statutes would be required to adopt community property concepts under the Equal Rights Amendment. Ms. Tucker answered that both concepts, common-law property and community property, would be scrutinized under the ERA for sex-based classifications, that unequal provisions, under existing property laws, such as assigning control of property, usually to the husband, would be struck down, and that the nonmonetary contributions of homemakers would be recognized, but that title law *per se* would not be covered by the amendment.

(f) Military service

Senator Hatch asked Ms. Tucker if the amendment would overturn the Supreme Court decision in *Rostker* v. *Goldberg* (453 U.S. 57 (1981)), limiting draft registration to men, whether the amendment would result in women being assigned to combat units, and whether physical standards or skill requirements for military jobs would be lowered. Ms. Tucker said she believed that registration and the draft should not discriminate on the basis of sex, adding that all men, even the blind and lame, are now required to register, but no women. Regarding assignment to combat duties, she said that such assignments should go to the person best able to do the job and that while the ERA would prohibit general, sex-based classifications, that it would not cause standards to be lowered.

(g) Domestic relations law

Ms. Tucker said that laws which place the primary responsibility upon the male for either family support or child support would be in violation of the amendment. Senator Hatch asked if laws requiring a child to take the surname of the father would be in violation of the ERA. Ms. Tucker answered that she thought they would be challenged. In response to a question about laws that permit divorce if, at the time of marriage, a man is unaware of the pregnancy of his wife by another man, Ms. Tucker said that such laws would fall. Senator Hatch asked if existing alimony or child-sup-

port awards would be reopened by passage of the amendment if they were awarded under a statute that was not sex-neutral. Ms. Tucker responded that, given a major change of circumstance, alimony and child support awards may always be reopened by the court under existing law, adding that, if the ERA were judged by the courts to create such a circumstance, such awards could be reopened. Last, Senator Hatch asked if Ms. Tucker agreed with a statement made by the Civil Rights Commission that "[t]he present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles of men and women with respect to family life, and that such deeply embedded stereotypes would be addressed by the ERA." Ms. Tucker said she agreed with the quoted statement.

(h) Definition of "rights" to be conferred by the amendment

Senator Hatch questioned Dr. Berns about his statement that the ERA is the "only provision in the Constitution bestowing or protecting a right without identifying that right." Dr. Berns said that where the 15th, 19th, and 26th amendments use the word "right" or "rights," the right referred to is specifically identified, e.g., in these cases, the right to vote. He said that, unlike these previous amendments, the text of the Equal Rights Amendment fails to define a specific right.

[Ms. Tucker declined to comment on this question, noting that she had already discussed the question of rights conferred under the amendment in her formal testimony.]

Summary of Statement by Hon. Henry J. Hyde, a Representative in Congress From the State of Illinois

Representative Hyde's opposition to the amendment was based on his perception that the ERA would strengthen rights to abortion and to abortion funding. He spoke in favor of changing the amendment to include a statement specifying that the intent of the framers was that the amendment should not be interpreted to expand abortion rights.

RELATIONSHIP OF THE ERA TO ABORTION

Logically, there should be no relationship between abortion and the ERA, but recent experience suggests that the ERA, if it is proposed and ratified without an explicit provision against its use as a proabortion device, would be used to sweep away the minimal protection currently allowed to unborn children, and also to mandate tax funding for abortion.

LITIGATION UNDER STATE ERA'S

Litigation under State equal rights amendments provides an important source of evidence on how the ERA would be interpreted. In the 1978 case of *Hawaii Right to Life* v. *Chang* in Hawaii (Civil Docket No. 53S67), the 1980 case of *Moe* v. *King* in Massachusetts (Civil Docket No. 2231), and the 1983 case of *Fischer, Planned Parenthood, et al.* v. *Department of Public Welfare* in Pennsylvania (283 C.D. 1981), the American Civil Liberties Union (ACLU) argued

that denying abortions (an operation unique to women) while continuing to fund a wide range of other procedures (including those which are unique to men), constitutes discrimination on the basis of sex in violation of the State equal rights amendments. While these cases were all decided on other grounds, the argument advanced by the ACLU in all three cases is firmly grounded in past decisions of the U.S. Supreme Court.

LEGAL CHALLENGES TO ABORTION LIMITS UNDER A FEDERAL ERA

The Supreme Court has ruled that poor women who desire abortions have no constitutional right to a government-financed abortion since they are not one of the so-called suspect classes protected by the strict scrutiny standard of the courts. Strict scrutiny almost always results in a challenged law being struck down as unconstitutional. Since 1970, ERA advocates have emphasized that the amendment's principal legal effect would be to make sex a suspect classification under the Constitution. If sex discrimination were treated like race discrimination, government refusal to fund abortion would be treated like a refusal to fund medical procedures that affect members of minority races, i.e., the courts would certainly declare that exclusion unconstitutional.

Other laws regulating abortion would be treated similarly, including conscience clauses which permit doctors and nurses in State-supported institutions the right to refuse to participate in abortions. The argument that abortion deserves special treatment because of the interests of the unborn child would be impermissible, at least during the first 6 months of pregnancy, as a result of the *Roe* v. *Wade* decision (410 U.S. 113 (1973)).

The ACLU's decision to argue the connection between abortion and the ERA was explained in the newsletter of the Massachusetts Civil Liberties Union, which said that the State equal rights amendment provides a legal argument unavailable at the Federal level, thus making it necessary to turn to State constitutions for legal tools to save medicaid funding for abortions.

ARGUMENTS OF PROPONENTS

Proponents of both the ERA and abortion have made conflicting statements about the connection between the two issues. For example, Prof. Thomas Emerson of the Yale Law School has said that:

> (1) Passage of the ERA would not affect the power of the States to stop or regulate abortions, or the right of women to demand abortions, since the States' power over abortions depends on wholly different constitutional considerations, primarily the right of privacy; and
>
> (2) Nonetheless, while an ERA would not affect abortion directly, it would indirectly have an important effect in strengthening abortion rights for women.

Further, in the 1976 case of *General Electric Co.* v. *Gilbert* (429 U.S. 135 (1976)), proponents filed a brief arguing that a pregnancy exclusion in a health insurance plan violated Federal laws against sex discrimination and stated that, if the ERA were ratified, pregnancy-related classifications would be "subject to strict scrutiny," and that State laws discriminating against women with "disabil-

ities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment." Thus, the ERA would provide a basis for striking down all laws that discriminate against pregnancy-related disabilities, the most important of which are the abortion-funding restrictions and other abortion regulations that have survived challenges based on the right to privacy.

While it is not logically necessary for the Federal judiciary to hold abortion restrictions unconstitutional under the ERA, the Supreme Court did find a right to abortion as a corollary to a right to privacy that is not even mentioned in the Constitution. Congress should not give the courts the opportunity to find an even broader right to abortion and abortion funding in the ERA.

NEED TO AMEND THE AMENDMENT

An effort will be made by opponents of abortion to insert a clarifying statement in the ERA so that it cannot be used to expand abortion rights. By voting for this amendment to the ERA, Members of Congress who are genuinely committed to the ERA and who are also genuinely opposed to the expenditure of tax funds for abortion will have an opportunity to honor both commitments.

SUMMARY OF QUESTIONS DIRECTED TO REPRESENTATIVE HYDE

Senator Hatch questioned Representative Hyde on:

(1) The relationship between the proposed Equal Rights Amendment and abortion;

(2) Amending the amendment to preclude strengthening or increasing abortion rights; and

(3) Possible specific effects of the amendment on such questions as the funding of abortion under medicaid and on so-called "conscience clauses."

(1) RELATIONSHIP BETWEEN THE ERA AND ABORTION

Declaring that Supreme Court rulings currently allow "abortion on demand," Senator Hatch asked Representative Hyde how passage of the ERA could worsen this situation. Representative Hyde said that arguments made by the American Civil Liberties Union (ACLU) in three recent State court cases indicated that the ERA would provide an additional constitutional basis for legitimizing abortion. Senator Hatch asked Representative Hyde if he believed the ERA might provide an absolute right to abortion, even in the third trimester of pregnancy. Representative Hyde answered that if the suspect standard is the standard of review used by the courts under the ERA, then limitations—such as the current limitation of abortion in the third trimester—would probably be stricken.

(2) AMENDING THE AMENDMENT CONCERNING ABORTION RIGHTS

Representative Hyde urged that the ERA be amended so that it would not broaden abortion rights or create any new right to abortion. Responding to Senator Hatch, who asked if it would be necessary to amend the amendment to achieve this result, Representative Hyde cited the argument made by the ACLU in three court cases based on State ERA's—that denial of abortion funding under

medicaid is unconstitutional. He added that he believed that abortion funding is a sensitive public question that should be settled by Congress and not by the courts.

(3) POSSIBLE EFFECT OF THE ERA ON CERTAIN STATUTES PERTAINING TO ABORTION

(a) The Hyde amendment

Senator Hatch asked if the ERA would invalidate restrictions on Federal funding of abortions, known as the Hyde or "Hyde-type" amendments to appropriation bills, and similar laws restricting abortions enacted at the State and local level. Representative Hyde responded he hoped this would not be the case, but that there was a "good chance" that it would.

(b) "Conscience clauses"

Senator Hatch asked if so-called "conscience clauses," which give hospitals and medical personnel the right to refuse to perform abortions on grounds of conscience, would be jeopardized under the ERA. Representative Hyde said he suspected that such clauses would be challenged, although he did not know if the challenges would be successful. Representative Hyde agreed with a statement, quoted by Senator Hatch, that the right to refuse to perform abortions would be jeopardized, at least with respect to public institutions and personnel.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON PRIVATE AND PAROCHIAL EDUCATION

INTRODUCTION

On September 13, 1983, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the impact of the Equal Rights Amendment upon private and parochial education.

Jeremy A. Rabkin, assistant professor in the Department of Government and Director of the Program on Courts and Public Policy at Cornell University, argued against the amendment because of its likely impact on the financial status of private educational institutions and because he believed that the amendment would limit religious pluralism and educational diversity.

Donna E. Shalala, president of Hunter College of the City University of New York, supported the amendment, saying that she believed it would eliminate for women the disabling effects of sex discrimination in education and in other areas of public life.

SUMMARY OF STATEMENT BY JEREMY A. RABKIN, ASSISTANT PROFESSOR, DEPARTMENT OF GOVERNMENT, AND DIRECTOR, PROGRAM ON COURTS AND PUBLIC POLICY, CORNELL UNIVERSITY

Professor Rabkin opposed the amendment because of its likely impact on the financial status of private educational institutions and his belief that the amendment might limit religious pluralism and educational diversity.

Because the language of the Equal Rights Amendment is addressed to State and Federal governments, many people assume that its effects would be limited to public schools and State universities. In fact, since most public institutions are already subject to legal prohibitions on sex discrimination, private institutions may be more seriously and directly affected than public institutions.

EFFECT OF THE ERA ON DIRECT SUBSIDIES

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any program or activity receiving Federal financial assistance, but it includes a series of important exceptions to this general prohibition with regard to admissions policies, exceptions which allow private sector institutions to receive certain Federal funding and still remain single-sex institutions. Included under these exceptions are private elementary and secondary schools (except private vocational schools) and schools controlled by religious organizations that are exempt to the extent that the prohibition on sex discrimination would not be consistent with the religious tenets of the organization.

The Equal Rights Amendment would almost certainly prohibit direct Federal or State grants to any single-sex institution, eliminating the title IX exceptions now allowed. Regarding religious schools, the Supreme Court has held that the first amendment prohibits direct government grants to any religious school at the elementary or secondary level, [1] but has allowed substantial government assistance to religious institutions of higher education.[2] Many of the latter kind of schools might not be able to comply with a requirement of nondiscrimination or nondifferentiation between the sexes regarding admissions. If passage of the ERA results in a policy of nondiscrimination between sexes as a prerequisite for receiving Federal assistance, religious schools, along with secular women's colleges that try to maintain their established single-sex character, may face financial difficulties.

EFFECT OF THE ERA ON TAX EXEMPTIONS

The amendment may have its greatest impact on private schools through its implications for tax policy. Since 1970, the Internal Revenue Service has been denying tax exempt status to private schools that practice racial discrimination, a policy emphatically endorsed by the Supreme Court this spring in *Bob Jones University* v. *Regan* (51 L.W. 4593 (May 24, 1983)). The Court held that recognition as a "charitable" organization (a status which confers eligibility for tax-exempt status) must be withheld from institutions involved in any activity that is "contrary to a fundamental public policy." If the ERA were added to the Constitution, prohibition of sex discrimination would become fundamental public policy, similar to existing policy on race discrimination; and all single-sex institutions, including religious institutions, would be denied tax exemptions on the basis of sex discrimination.

To obviate this result, the Court could denigrate the ERA by holding, if it wished, that sex discrimination need not be held to the same standard as race discrimination. Or, since the *Bob Jones* decision rests on a statutory interpretation of the tax code, rather than a constitutional interpretation, Congress could rescue the Court by amending the tax code to clarify that—the ERA nothwithstanding—the "fundamental public policy" against sex discrimination should not extend to religious institutions or to various private organizations. However, there is already a substantial body of precedent and opinion to support the view that tax exemptions are a form of "State action" and that the constitutional prohibitions against discrimination by the government must apply equally to all recipients of governmental tax benefits. Further, a Congress recently adopting the ERA would probably feel uncomfortable in effecting such a disclaimer.

Loss of tax-exempt status might affect the fund-raising capacity of these institutions, since charitable contributions would no longer be tax deductible, a major incentive for would-be donors.

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[1] *Lemon* v. *Kurtzman* (403 U.S. 602 (1971)), and *Meek* v. *Pittinger* (421 U.S. 349 (1975)).
[2] *Tilton* v. *Richardson* (403 U.S. 672 (1971)), and *Hunt* v. *McNair* (403 U.S. 734 (1972)).

EFFECTS ON OTHER FORMS OF PUBLIC ASSISTANCE

But tax subsidies are not the only form of State assistance threatened by the ERA. Private schools practicing any form of sex differentiation, together with their students, might lose the benefits of other Federal programs, such as the loaning of textbooks or equipment, Federal and State loan grant programs, or use of municipal auditoriums for graduation exercises or playing fields in public parks. Many single-sex institutions and schools that hold to traditional patterns of sex separation or sex differentiation might not survive under the financial strain imposed by these new strictures. Further, it would seem that private organizations could not maintain any link with public schools or State universities if they failed to meet ERA standards of nondiscrimination. Thus, Boy Scout and Girl Scout troops might have to be excluded from public school facilities, and fraternities and sororities banished from State college campuses.

REGIMENTATION VERSUS ISOLATION: THE "MORAL" BURDEN ON PRIVATE EDUCATION

Without attempting to argue the moral differences between racial and sexual discrimination, there is substantial question as to whether sexual discrimination should be regarded with the same intolerance as racial discrimination. There is something wrong with a Constitution which places the sex-based admission policies of a Catholic seminary or a traditional woman's college on the same plane with the race-based policies of a white supermacist "segregation academy". Even in public schools, people want some degree of flexibility—such as the exceptions and qualifications granted private schools under title IX—and are certainly prepared to tolerate greater diversity in private education. The country should consider whether opposition to sexual discrimination, like opposition to racial discrimination, must override our traditional regard for religious pluralism and educational diversity.

SUMMARY OF STATEMENT BY DONNA E. SHALALA, PRESIDENT, HUNTER COLLEGE OF THE CITY UNIVERSITY OF NEW YORK

Dr. Shalala's support for passage of the amendment was based on her belief that it would eliminate for women the disabling effects of sex discrimination in education and other areas of public life.

NEED FOR AN AMENDMENT

In no area of public life is the ERA more important than in education. Sex discrimination exists in virtually every aspect of education, both public and private. By denying equal access to education to women, we narrow their choices and options in employment, income, and mobility. The ERA is central to ensuring women's right to education since it will—

provide women with a permanent constitutional basis to assert that right;

provide greater protection to women's rights by insulating them against political presures, e.g., to repeal certain existing

antidiscrimination statutes and to create special exceptions in other antidiscrimination statutes; and

free Congress to implement women's equality in an efficacious and cost-effective manner.

SEX DISCRIMINATION IN EDUCATION

While title IX has improved women's access to education, there still are patterns of discrimination evident in admissions, courses of study, athletics, and employment of women in education.

(a) Admissions and courses of study

Although title IX has outlawed certain discriminatory admissions practices, especially in graduate and professional programs, the percentages of women enrolled in certain courses of study indicate less than full access to areas such as medicine, law, dentistry, veterinary medicine, and doctoral degree programs.

In secondary and post-secondary education, almost half of all vocational programs are overwhelmingly segregated by sex and few women are enrolled in training that leads to higher paid, typically male skills. The importance of training women for more highly paid jobs is accentuated by the rising divorce rate and the increase in proportion of poor women who head families. Moreover, since 80 percent of women currently working are now concentrated in occupations which are rapidly declining or becoming obsolete due to technological advances, large numbers of low-skilled women may become permanently unemployed.

Women are excluded from predominantly "male" jobs, both by subtle social messages about job segregation—i.e., the fact that many jobs are still performed almost exclusively by men—and by direct discouragement by school counselors or employers. The failure to actively recruit and train female students to traditional male vocational courses endorses and perpetuates these discriminatory patterns.

Women are also discouraged from studies in math and science, even though these are extremely important areas of future employment. The problem of women's exclusion from these areas is exacerbated by the fact that sex-segregated public schools at the elementary and secondary level are tolerated under both title IX and the equal protection clause of the 14th amendment. In 1977, the Supreme Court upheld the constitutionality of excluding a girl from an all-male high school with a superior science facility and academic reputation [3] by ruling that such exclusion does not violate the equal protection clause of the 14th amendment. This result was recently reversed by a suit brought in a State court under the State's equal rights amendment.[4]

Statistics on women enrolled in scientific and technical fields indicate that women are still enrolling in these areas in significantly smaller numbers than men. The implication of these statistics for the Nation's future is staggering: at a time when our society is

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[3] *Vorchheimer* v. *School District of Philadelphia* (532, F. 2d 880 (3rd Cir., 1976)), affirmed by Supreme Court (430 U.S. 703, 1977).

[4] *Newberg* v. *Board of Public Education* (Court of Common Pleas No. 5822, August 30, 1963).

moving into an advanced technological era, half the population is effectively excluded from participation.

(b) Athletics

Sports and physical activity are other important areas of student life that would be affected positively by the Equal Rights Amendment. While passage of title IX has increased the enrollment of women and girls in athletic programs, women are far from achieving equality of opportunity in athletic participation. Moreover, the gains they have made are at risk due to the efforts of the Reagan administration to limit title IX so as virtually to eliminate athletics from coverage by that act. Loss of title IX coverage of athletics would deny talented women careers in athletics, would deny all young women the physical and emotional development that comes from participation in sports, and would reinforce the stereotypes that women are innately weak and that the talented athletic woman is an aberation. For girls as much as boys, athletics is a crucial part of education. When girls and women are denied access to athletics, they are denied a full education.

(c) Employment in education

Women's employment in education also shows effects of active discouragement and stereotypical treatment, with the result that the number of women teaching in higher education is low, and fewer women than men are tenured. The low status of women's employment opportunities in higher education is further demonstrated by the percentage of women on instructional staffs. Since 1972, there has been an overall gain in employment of women of only 5 percent, with women instructors contributing most of the increment and women who are full professors the least. The meaning of these statistics is that young women have lost role models, all women have lost leaders, and women in higher education have lost job security.

Similar patterns are found in the employment of women in elementary and secondary education where few women are head administrators of schools or superintendents, and male classroom teachers average higher salaries per year than female teachers.

The Equal Rights Amendment is necessary to supplement the protections afforded to women employed in educational institutions by title VII of the Civil Rights Act, particularly in the granting of academic promotion and tenure, which are the most difficult areas to challenge under current employment discrimination law.

EXISTING LAWS PROHIBITING SEX DISCRIMINATION IN EDUCATION

Principal laws to redress sex discrimination in education include title IX of the Education Amendments of 1972, title VII of the Civil Righs Act of 1964, the equal rights amendments in State constitutions, and the 14th amendment to the U.S. Constitution. All of these provisions have major gaps in coverage.

(a) Title IX

Title IX does not prohibit sex-based discrimination in admissions to the Nation's elementary and secondary schools, private colleges,

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and even public colleges if they have always been single-sex institutions. Thus, girls and women can be denied equal access to certain institutions, limiting their educational opportunities regarding choice of faculty, course offering, or facilities.

(b) Title VII

The primary weakness of title VII in redressing discrimination against women employed in academic positions is found in the reluctance of Federal judges to closely examine university hiring, promotion, and tenure procedures. The Equal Rights Amendment would require more strengent judicial scrutiny of these procedures.

(c) State equal rights amendments

Although only 16 States have State equal rights amendments, cases brought under State ERA's demonstrate that the Federal ERA will be an effective tool for all women seeking an equal education.

(d) The U.S. Constitution

The U.S. Constitution, as it is presently being interpreted, is of only limited utility in overcoming sex discrimination.

EFFECT OF THE ERA IN ELIMINATING SEX DISCRIMINATION IN EDUCATION AND OTHER AREAS OF PUBLIC LIFE

With the Equal Rights Amendment, single-sex schools that deny women access to any educational facilities would be prohibited, unless the purpose of sex segregation is to implement principles of affirmative action and lead to the creation of equal access to full educational opportunities. An additional exception, as noted above, would be in cases where sex segregation serves specific religious principles or purposes.

The effect of the Equal Rights Amendment on education is simple: the choice of whether to discriminate on account of sex in education would no longer be an option, unless justified by affirmative action principles. The ERA would establish equality on a permanent basis, making it immune to the vagaries of administration policy. It would provide a constitutional foundation for statutory provisions, ensure enforcement of such statutes, and prevent exceptions and limitations on remedies. Finally, the ERA would free Congress to debate the most efficacious and cost-effective means to implement women's right to equality, not whether women are entitled to that equality.

SUMMARY OF QUESTIONS DIRECTED TO PROFESSOR RABKIN AND DR. SHALALA

Questions were addressed to the panel principally by Senator Hatch and were focused on the following issues:

(1) Potential financial impact of the ERA on single-sex institutions and on students attending single-sex institutions;

(2) Affirmative action as a rationale under the ERA for women's schools, i.e., schools wishing to maintain their status as single-sex institutions, while at the same time remaining eligible for Federal aid;

(3) The impact of the ERA on single-sex social fraternities at public colleges;

(4) Comparison of the prohibition of sex discrimination under title IX and under the ERA; and

(5) The concept of State action under the ERA and under the 14th amendment.

(1) POTENTIAL FINANCIAL IMPACT ON INSTITUTIONS AND STUDENTS

(a) Federal assistance

Senator Hatch asked whether private, single-sex schools would be permitted to receive Federal assistance under the ERA, or would such aid be limited to coeducational schools. Dr. Shalala said that private single-sex schools would not be permitted to receive Federal aid, excepting women's colleges that continue as single-sex institutions for the purpose of eliminating the effects of past discrimination and for the purpose of affirmative action (with regard to educational opportunities). It was her opinion that private men's single-sex colleges, with the exception of religious training schools, would be effectively eliminated under the ERA, since they would not be permitted to receive Federal assistance such as tax exemptions, direct guaranteed student loans, or any other public moneys under the amendment.

Regarding the question of whether private, single-sex institutions might remain single-sex if they did not receive Federal assistance, Dr. Shalala answered that she did not know of any private institution in which there is not some form of public involvement, such as tax-exempt status, direct financial assistance, or student aid. She said that, under an ERA, private institutions wishing to remain all-male would have to operate without public involvement or public moneys.

(b) Tax-exempt status

Senator Hatch asked if all private single-sex institutions (except women's colleges, as discussed above) would lose tax-exempt status. Dr. Shalala denied that single-sex religious training institutions would be affected.

Senator Hatch noted that title IX presently exempts from coverage any school controlled by a "religious organization," to the extent that the prohibition on sex discrimination would be inconsistent with such a school's religious tenets. He asked if this exception would be consistent with the Constitution, if the ERA were ratified. Dr. Shalala responded that in the *Bob Jones* decision the Supreme Court was careful to distinguish between educational and religious institutions and those essentially educational institutions which had some religious purpose. She said that single-sex seminaries would not be affected even if their religious practices were discriminatory, but educational institutions that discriminated would not be eligible for government aid or benefits. She stressed that even the *Bob Jones* decision did not compel the Internal Revenue Service to revoke tax-exempt status for educational institutions that discriminate.

Professor Rabkin disagreed, arguing that under the ERA the Constitution would require denial of tax-exempt status to single-sex

institutions. He also stated that the *Bob Jones* decision did not distinguish between religious institutions which happen to be educational and educational institutions which happen to be religious. He agreed with a statement by Senator Hatch that if sexual discrimination were considered by the courts under the same "suspect" classification as racial discrimination, the exception for religious institutions now provided under title IX would not be allowed, and institutions distinguishing between the sexes in their religious practices would lose their tax-exempt status.

Professor Rabkin concluded that denial of tax-exempt status is a threat to religious activity since it is important to most organized religions to maintain certain kinds of educational institutions.

In rebuttal, Dr. Shalala emphasized that the issue was whether the courts would consider a single-sex seminary to be covered by [the free exercise of religion provisions of] the first amendment. She said that the courts must balance the first amendment with the ERA.

Senator Hatch then asked whether it would be constitutional under the ERA for Federal or State laws to allow charitable deductions for contributions to private single-sex institutions.

Dr. Shalala and Professor Rabkin agreed that under the ERA such deductions would not be constitutional.

(c) Nonmonetary subsidies

Professor Rabkin and Dr. Shalala also agreed that other subsidies currently provided to private single-sex institutions by government, including free use of textbooks and of public facilities, would not be permitted under the ERA.

(d) Scholarship assistance

Senator Hatch asked whether the ERA would preclude the Government from providing scholarship assistance or any other form of educational loan to a student attending a single-sex educational institution. Dr. Shalala answered that such assistance would be permitted only in single-sex women's colleges that could demonstrate an affirmative action purpose or a purpose related to eliminating past discrimination.

(e) Extent of the financial impact of the ERA

To illustrate her view that the ERA would have a financial impact only on a small number of schools, Dr. Shalala stated that there are only 10 private all-male institutions in the country that are not religious training schools, and two public all-male schools—Virginia Military Institute (VMI) and The Citadel. She suggested that VMI and The Citadel (both military schools) could be integrated following the example of the U.S. Military Academies. All-female institutions constitute about 1 percent of the total of all educational institutions, she said.

(2) AFFIRMATIVE ACTION AS A RATIONALE UNDER THE ERA FOR WOMEN'S INSTITUTIONS WISHING TO MAINTAIN SINGLE-SEX STATUS WHILE ALSO REMAINING ELIGIBLE FOR FEDERAL BENEFITS

Dr. Shalala stated several times that under the ERA private, all-female single-sex schools or programs that are designed to overcome the effects of discrimination probably would be permitted to continue as single-sex schools for a "reasonable" period of time without losing eligibility for Federal financial assistance by employing the affirmative action rationale mentioned in *Mississippi University for Women* v. *Hogan* (458 U.S. 256 (1979)), a recent Supreme Court sex discrimination case.

Senator Hatch interjected that the *Mississippi* case concerned a public school.

Professor Rabkin took issue with Dr. Shalala's statement that women's colleges could continue to benefit from Federal assistance under an affirmative action rationale, arguing that there is no parallel doctrine with regard to race discrimination. Dr. Shalala responded that she knew of no evidence that the Federal Government is trying to integrate private, all-black institutions, and that her statement concerned institutions that are making a positive contribution to overcoming the effects of discrimination and promoting sexual equality.

Senator Metzenbaum also disagreed with Dr. Shalala on the question of using affirmative action as a rationale for maintaining single-sex status and Federal benefits simultaneously, stating that he did not think that under the ERA all-female schools would be allowed to discriminate against men while all-male schools were denied a corresponding right. In response to a question by Senator Hatch, Senator Metzenbaum said he would be willing to amend the amendment stating this principle. Then Senator Metzenbaum and Professor Rabkin made separate statements concerning the difficulty of establishing guidelines for an affirmative action exception. Professor Rabkin characterized the alleged need for affirmative action as an ideological claim that could not be measured.

(3) IMPACT OF THE ERA ON SINGLE-SEX SOCIAL FRATERNITIES AT PUBLIC COLLEGES

Senator Hatch asked whether social fraternities and sororities at public colleges would be required to become coeducational "social societies" under the ERA. Dr. Shalala indicated that the ERA would affect such groups only if they received public aid of any kind, e.g., use of free or reduced-rate space owned by a public college, or if they were so integrated into the academic life of the institution that the single-sex restriction discriminated against the excluded sex, as in the case of certain single-sex honor societies.

Professor Rabkin said that an institution sponsoring a single-sex society would be required to cut financial ties either with the fraternity or with the Federal or State government.

(4) COMPARISON OF THE PROHIBITION OF SEX DISCRIMINATION UNDER TITLE IX AND UNDER THE ERA

In prior questions concerning the possible financial impact of the proposed amendment, the existing exception under title IX regarding single-sex admissions policies at schools controlled by a "religious organization" was compared with the status of such schools under an ERA. Related questions compared title IX and the ERA regarding scope and enforcement powers.

Senator Hatch asked how the ERA would eliminate discrimination in education. Dr. Shalala explained that enforcement is now selective under title IX and said she believed a broader based approach is needed if women are to have equal opportunities in education.

Professor Rabkin countered that the problems of enforcement would continue under an amendment. He added that title IX, because it is narrower than the amendment, allows more diversity of viewpoint in education. In his opinion, the so-called "gaps" in title IX reflected a legislative concern with flexibility and reason.

Dr. Shalala commented that the problem was a *lack* of diversity and said that women are discriminated against in most educational programs.

Senator Hatch asked Dr. Shalala to elaborate on her comment that the ERA would require closer judicial scrutiny of university hiring, promotions, and tenure procedures. Dr. Shalala indicated that procedures would have to be more carefully specified and that affirmative action plans would be used to correct particular problems.

Professor Rabkin said that if Dr. Shalala was correct in her statement, then judges would be making academic decisions. Dr. Shalala responded that judges would only be expected to review procedures.

(5) THE CONCEPT OF STATE ACTION UNDER THE 14TH AMENDMENT AND UNDER THE ERA

In response to a question by Senator Hatch, Dr. Shalala and Professor Rabkin both agreed with a statement by the California Commission on the ERA that the amendment should be interpreted to prohibit the administration by State institutions of all private, sex-restricted scholarships.

Senator Hatch noted that the California Commission on the ERA also has said that the concept of State action developed under the 14th amendment will not necessarily apply to legal analysis under the ERA. Professor Rabkin responded that although such a development was possible, he believed it to be unlikely. In his opinion, the probable answer was that the courts would treat sex discrimination as analogous to race discrimination and rule that where race discrimination is forbidden under the Constitution, sex discrimination also is forbidden.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON MILITARY LAW AND POLICY

INTRODUCTION

On November 1, 1983, the Senate Subcommittee on the Constitution received testimony from three witnesses, first hearing general arguments from a sponsor of the proposed amendment and then hearing arguments regarding the impact of the Equal Rights Amendment upon military law and policy.

Senator Robert Packwood of Oregon testified as a sponsor of the proposed amendment, urging its passage in order to guarantee that women's rights be uniform throughout the country, as well as federally guaranteed and protected.

Eliot A. Cohen, professor at Harvard University, directed his statement to adverse consequences to the military, should the Equal Rights Amendment be ratified.

Antonia Handler Chayes, partner in the law firm of Csaplar and Bok, directed her testimony to the question of whether passage of the Equal Rights Amendment would impair or enhance the ability of the armed forces to field and sustain combat-ready forces in any emergency.

SUMMARY OF STATEMENT BY HON. ROBERT PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Testifying as a sponsor of the proposed amendment, Senator Packwood urged its passage to guarantee that women's rights be uniform throughout the country, as well as federally guaranteed and protected.

PATTERNS IN EXTENSION OF RIGHTS

The Constitution in 1787 and the Bill of Rights in 1791 extended full protection only to white males over 21 who owned real property. Since then, the expansion of liberty in this country (with a few exceptions) has not involved the creation of new liberties so much as the extension of existing liberties to classes of people previously not covered by the Constitution. Sometimes these extensions of rights were by constitutional amendment and sometimes by Supreme Court decision.

NEED FOR A CONSTITUTIONAL AMENDMENT REGARDING RIGHTS FOR WOMEN

The Court has not extended full protection to women. If women are to have equal rights, these rights must be guaranteed at the Federal level, since equal rights are not equal if they vary from State to State. Rights must be uniform and therefore federally guaranteed and protected. A statutory approach to equal rights is

inferior to a constitutional amendment because a statute will be reviewed by any court with less awe than the Constitution and can be repealed by a majority vote of Congress. Clearly, therefore, only a constitutional amendment will guarantee equal rights for women. A Nation founded on the ideals of freedom and opportunity for all its citizens cannot continue to deny equality rights to more than 50 percent of its population. To say that equality can be achieved by statute is like saying that the first amendment is not needed to protect free speech.

CHANGING ROLES OF WOMEN

Women's roles have changed dramatically, especially during the last decade, with significant effect on society, as indicated by current data on workforce participation, two-earner families, childbearing rates, incidence of divorce, and numbers of female-headed households. More women are in need of the same opportunities and rights now available to men. The battle to obtain these rights should not be won at the cost of years of litigation and legislative pleadings.

EFFECTS OF THE AMENDMENT

The Equal Rights Amendment would accomplish several crucial objectives:

(1) It would strike down sex-based laws and regulations that prevent women from achieving equality.

(2) Following passage of the amendment, subsequent laws and regulations would be based on individual characteristics and abilities.

(3) A Federal Equal Rights Amendment would ensure that these fundamental equalities are extended to the entire Nation and made invulnerable to executive or congressional action.

SPECIFIC BENEFITS

Included among the many benefits to men as well as women, if the Equal Rights Amendment is ratified, would be the following: Women in the workplace would receive treatment equal to male counterparts in hiring, promotion, salaries, and benefits, as shown by the extensive reform in this area that has occured under State equal rights amendments. The amendment would strengthen the position of women seeking income, health, and retirement protection by prohibiting sex-based discrimination in insurance, pensions, and retirement security programs that involve governmental action. By guaranteeing that marriage would be viewed as a legal partnership, the amendment would benefit families and homemakers by bolstering the effort to secure legal and economic rights for homemakers, both during marriage and in the event of divorce. Service in the military would be contingent on individual qualifications and military assignments would be based on an accurate assessment of job requirements and relevant qualifications.

ARGUMENTS OF OPPONENTS

Regardless of such benefits, opponents argue that the Equal Rights Amendment is not needed; they blind themselves to the importance of the measure by shrouding it in myth. For example, many claim that the amendment would compel military commanders to assign women to combat positions, even if they are not qualified; that the amendment would increase the availability of abortions, although this right is already guaranteed by other constitutional protections; and that the amendment would force integration of single-sex private schools, clubs, and other private institutions, such as fraternities and sororities—the amendment will not completely affect private institutions where no State action is involved.

CONCLUSIONS

Because of these and other myths, opponents contend that sex discrimination should be corrected by statute, if at all. That solution is simply too limited and too late. Equality of rights is too precious to be subject to shifting attitudes and interpretations and the passage of an occasional statute. After 200 years, it is time to ensure the principle of equality for women.

SUMMARY OF QUESTIONS DIRECTED TO SENATOR PACKWOOD

The questioning of Senator Packwood focused on three points raised in his statement:

(1) The application of the amendment to abortion rights;

(2) The effect of an amendment on employment discrimination; and

(3) The effect of an amendment on service in the military.

(1) ABORTION RIGHTS

Most of the questions asked of the Senator focused on his statements relating to the application of the amendment to abortion rights. He was asked whether the courts might interpret the amendment to require public funding of abortions for medicaid recipients (reversing a pair of 1980 Supreme Court decisions, *Harris* v. *McRae* (448 U.S. 297), and *Williams* v. *Zbaraz* (448 U.S. 247), in which the Supreme Court upheld the right of a State participating in a Medicaid program to fund only those medically necessary abortions for which it received Federal reimbursement), and whether the wording of the amendment should be changed to prevent such an interpretation.

Questions relating to public funding of abortions were asked by Senators Hatch and Grassley, who were concerned that passage of the ERA would increase abortion rights in those areas where they were not now recognized, e.g., with respect to public funding. Senator Packwood responded that in his judgment the amendment would not compel public funding because the Court cannot force Congress to appropriate funds for programs, adding, however, that he did not wish to "second-guess" what the Court might do.

In answer to Senator Hatch's statement that abortion rights groups have already sought to use State ERA's to increase abortion rights, Senator Packwood pointed out that this argument had not

been adopted yet by any court, but that he felt certain a case would be brought to court on that basis if the amendment passed. Senator Hatch said that he believed it was Congress' responsibility to make clear the scope of the amendment, as opposed to leaving such interpretations to the courts. Senator Packwood responded that he did not favor any additions to the amendment, but that this was a question for the Committee to decide. He added that he would work to remove any additions to the amendment when it was brought before the full Senate for consideration.

(2) EMPLOYMENT DISCRIMINATION

On this issue, clarification was sought regarding Senator Packwood's statement that the ERA was "the most powerful tool" to insure women equal pay and equal opportunities in employment. In response to questions from Senator Hatch regarding changes the ERA might require in existing Federal employment statutes, such as the Equal Pay Act, title VII of the Civil Rights Act, the Equal Employment Opportunity Act, or similar State laws, Senator Packwood acknowleged that the Equal Rights Amendment would not require any changes to strengthen current antidiscrimination employment laws. Instead, the amendment would act to reinforce statutes requiring equal pay and equal opportunity for women by providing constitutional backing for laws pertaining to sex discrimination in employment.

(3) MILITARY SERVICE

Senators DeConcini and Kennedy expressed interest in the question of how military assignments would be made under the amendment and what effect the use of women in certain military assignments might have on the effectiveness of the Armed Forces. Senator Packwood said assignments of women would be made by matching individual characteristics or qualifications to particular military needs, not by assigning each sex to jobs by some kind of quota system. In response to a further question from Senator DeConcini, Senator Packwood said that he knew of no analogy which could serve as a legal precedent for interpreting the amendment to require that a military commander must equalize assignments by sex in a combat situation (i.e., situations such as affirmative action requirements sometimes imposed by the courts in nonmilitary employment situations, which require employers to make active efforts, for the purpose of remedying discrimination, to assign women to jobs in which they were underrepresented).

Senator Kennedy drew an unfavorable parallel between the present reluctance of the armed services regarding the assignment of women and the services' past exclusion of blacks and other minorities—an exclusion, he said, that was related to an alleged belief that general integration of these groups into the services would impair combat efficiency and morale. Senator Kennedy's statement led Senator Packwood to comment that in 1970 Senator (Sam) Ervin, in opposing the ERA, suggested four questions raised by the amendment under the ERA:

(1) Whether the amendment would require the admittance of women to the service academies;

(2) Whether separate women's units such as the WAC's would be abolished;

(3) Whether men and women would take basic training together; and

(4) Whether women would be required to perform jobs in combat zones.

Senator Packwood concluded that all these changes had taken place without the ERA. Senator Hatch objected to Senator Packwood's statement, noting that the services have returned to their former practice of separate basic training for men and women.

Summary of Statement by Eliot A. Cohen, Professor, Harvard University

Mr. Cohen's statement was directed to adverse consequences to the military, should the Equal Rights Amendment be ratified.

ENDING THE EXCLUSION OF WOMEN FROM COMBAT

ERA proponents (and opponents) agree that the ERA would lead to mandatory draft registration of women as well as men and, in the event of a resumption of the draft, application of conscription to both sexes. There is less agreement about combat exclusion. Combat exclusion, as presently practiced, closes certain military occupational specialities to women, such as infantry and cannon artillery, which are directly combat-related, and closes other specialties because of the high likelihood they have of indirectly forcing women to engage in combat. If Congress wished, it could abolish any aspect of the combat exclusion policy now; however, it has not chosen to do so.

There are overwhelming reasons for thinking that the ERA would require the abolition of all sex-based distinctions, including the combat exclusion policy. When the ERA passed the Senate in 1972, Senator Ervin's attempt to add an amendment excluding women from combat was defeated. This seems to suggest that the *Yale Law Journal* article was correct in holding that women would serve in all kinds of units and be eligible for combat duty.[1] Other statements by authoritative supporters of the ERA support this view. More to the point, Prof. Jeremy Rabkin of Cornell University has argued that with respect to combat exclusion, the ERA would put discrimination on the basis of sex at the same level as discrimination on the basis of race. If this is the case, then no military policy based on sexual differences could be maintained, particularly combat exclusion.

UNACCEPTABILITY OF THIS STEP TO THE AMERICAN PEOPLE

Although attempts have been made in the Congress and the courts to require that women as well as men register for the draft, the Gallup polls have continuously shown that most Americans, though favoring draft registration, oppose registration of women. More significantly, approximately two-thirds of those Americans

[1] Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman: "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," Yale Law Journal, vol. 80, April 1971, pp. 871-985.

polled have opposed the notion that women should be eligible for combat roles, if any kind of draft were required, with more women opposed than men.

LACK OF PRECEDENT REGARDING THE ABOLITION OF COMBAT EXCLUSION

Only in the most dire national emergencies have there been large scale conscription of women for combat. The Russians drafted large numbers of women during World War II, but the Soviet army today has few female soldiers, despite the participation of Soviet women in many activities that seem "untraditional" in other countries. Israel used women in its underground militia from the founding of the first Jewish settlements and later used women briefly in combat units of the Israel Defense Forces until the acute manpower and strategic crisis of the opening stages of the war had been overcome. Today, although Israel drafts 50 percent of its women for a 2-year tour of duty, women do not serve in combat units and they are excluded from front line positions.

Thus we have examples of two countries which have had experience with women in combat, which maintain substantial and powerful military establishments, and which work from ideologies sympathetic to the use of women in combat. Neither sends women into combat today, nor would seem to have serious plans to do so in the future. In view of these facts, it is evident then an American decision to sweep away all sex barriers in the Armed Forces would constitute an experiment in military organization of unprecedented proportions.

DAMAGE TO THE ARMED FORCES

We must not judge military organizations by the standards we apply to their civilian counterparts. War requires levels of physical and emotional exertion quite unparalleled in the civilian world. While it is clear that women can and do serve successfully at all levels of employment in American business, universities, and government bureaucracies, such cannot be the case for the Armed Forces.

Military effectiveness rests primarily on the cohesiveness of small groups of soldiers. The relationships in these small groups take on enormous importance, for soldiers are courageous in the midst of danger because of their sense of brotherhood with those about them, their fear of letting down their buddies on the one hand, and their desire to preserve and protect them on the other. This phenomenon, known as "male bonding," is threatened by the intervention of disturbing factors such as romantic or sexual attachments or jealousies.

Professor Cohen quoted from an article [2] which he said favored the introduction of women into combat, which described the following psychological phenomenon:

> Men are motivated to fight and survive in battle by preserving a mental picture of the normal world back home.

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[2] Segal, Mady Wechsler: "The Argument for Female Combatants," in Goldman, Nancy Loring, ed.: "Female Soldiers: Combatants or Noncombatants?", Westport: Greenwood, 1982, p. 273.

One of the major components of the world back home is women who are warm, nurturing, ultra-feminine, and objects of sexual fantasy. If women are allowed into combat, this psychological differentiation cannot be maintained, and we lose this psychological defense. Military organizations make conscious use of masculinity which, while occasionally tasteless or vulgar, performs an invaluable service in welding groups of young men into units of proud, aggressive, and competent soldiers.

Many uniformed women have in the past and will continue in the future to play an honorable, useful, and vital role in our Nation's defense. There are many military positions for which women are as well or perhaps better suited than men. But it is clear that many military jobs should be confined to men, that women should be integrated into military units with the greatest of care, and that the ERA's abolition of sex-based criteria would be an unmitigated disaster.

ASSESSING THE COST OF THE AMENDMENT

In the military area, the price of the Equal Rights Amendment would include the expense of cumbersome draft procedures, the disruption of personnel strength when soldiers became pregnant, and the inconvenience of measures to preserve privacy in the field. Another infinitely greater cost might be the lives of young American men and women.

SUMMARY OF STATEMENT BY ANTONIA HANDLER CHAYES, PARTNER, LAW FIRM OF CSAPLAR AND BOK

Ms. Chayes directed her testimony to the question of whether passage of the Equal Rights Amendment would impair or enhance the ability of the Armed Forces to field and sustain combat-ready forces in any emergency.

IMPORTANCE OF MILITARY WOMEN IN WARS OF THE FUTURE

Removal of legal impediments to permit the Armed Forces fully to tap a much larger pool of potentially capable and talented people (50 percent of the population) would enhance national security. As experience with peacetime utilization of women has demonstrated, the increase in numbers of women into specialties previously closed to them has improved the quality of manpower required for an increasingly technologically sophisticated fighting force. We are planning for military situations in which the enemy greatly outnumbers us in military manpower and equipment and in which his lines of communication and supply are shorter than ours. In these circumstances, we expect to compensate for numerical disadvantage by leveraging technological advantage.

Awareness is growing that we have placed a crushing burden on the credibility of our nuclear deterrent. Nuclear war is not winnable. We raise the nuclear threshold by increasing the deterrent value of the weapons systems and strategy of the wars we can fight and win. Manpower planners must be freed from artificial legal

and psychological barriers against using a major segment of the capability and talent needed for such an effective deterrent and fighting strategy.

THE ILLOGIC OF PREJUDICE AGAINST MILITARY WOMEN

We would not cripple ourselves by arbitrarily limiting the pool to one group, for example, to people with brown eyes. It would be unthinkable today to exclude blacks and Hispanics, although it was still argued in World War II that desegregating the Armed Forces would impair the morale and fighting capability of the white majority. Gradual understanding of the impact of segregation in sapping combat strength moved us toward full integration. We learned in Vietnam to fight beside an ally who was shorter, lighter, weaker, and culturally different.

The fears are understandable that (until now) have kept the military the one area of Federal law where explicit discrimination still exists. The experience of the last several years has proven those fears to be groundless. Today, women's skills and capabilities have become so integral to the efficient operation of the armed services that, in any national emergency, it appears that conscription of women is inevitable. Plans have already been developed for a draft of both men and women with medical skills.

QUALITY AND COST-EFFECTIVENESS OF WOMEN RECRUITS

In the all-volunteer force, the quality of new recruits increased after the end of the draft due to expanded recruitment of women who were required to meet higher standards—more than 91 percent of all female recruits were high school graduates, as compared with less than 67 percent of male recruits. In addition, the costs of recruiting these women were far less than for comparably qualified men.

NO DISRUPTION OF MILITARY POLICIES AND PRACTICES

A 1977 study by the Brookings Institution estimated that 33 percent of military jobs performed by the enlisted force potentially could be filled by women without radically departing from current policies and practices or disrupting the rotation or career opportunities for men. An estimate by the military services of the potential for using women where the combat effectiveness of the services was the overriding issue indicated that well over half of enlisted and officer positions were theoretically available to women.

INCREASING DIFFICULTY OF EXCLUDING WOMEN FROM COMBAT OR COMBAT-RELATED JOBS

By the end of 1981, 55 percent of enlisted women were in traditionally all-male specialties, a critical indicator because of the technological nature of our weapons systems. While hand-to-hand combat may always exist, advance systems are likely to be far removed from the battlefield. The range and scope of today's weapons make it unlikely that the front line will ever again be clearly delineated, making it difficult to protect women from high risk of casualty, wherever they may be.

NO ADVERSE EFFECT ON PERFORMANCE AND MORALE OF MILITARY UNITS

In many studies designed to measure the impact of women upon the performance of military units, women in both traditional and nontraditional positions performed well and did not adversely affect the morale or the performance of the unit. As Senator William Proxmire once noted, "Every study indicates that qualified women soldiers can serve in any capacity. But each time the Pentagon receives a report confirming this conclusion it . . . simply commissions another study."

COSTS OF DISCRIMINATION

Despite their demonstrated value to the armed services, military women have suffered discrimination which can be very damaging to morale. For example, much concern has been expressed about pregnancy, although military managers are plagued by several other forms of employee disability that have negative effects on efficiency and productivity. While on the job, men in the military lose approximately 67 percent more time than women (including time lost by women for pregnancy), with the majority caused by desertion, alcoholism, and drug abuse. Moreover, adequate child care is not only a female service member's problem. In the Air Force, for example, 58 percent of single parents are men.

The experience of military women in nontraditional fields is both encouraging and discouraging. While they feel themselves to be trailblazers in developing skills in difficult and demanding fields substantially closed to women in civilian life, and are proud to be competent as carpenters, aircraft maintenance workers, and pilots, for example, there has been some reverse migration to more traditional "women's" fields which are less taxing. It takes time for women to adjust to nontraditional skill demands. Men also tend to migrate from difficult and demanding jobs, and the overall attrition rate from such jobs for women has not been higher than for men.

Discrimination against women, together with the occupational restrictions in effect today have seriously damaged women's career progress in the armed services. Women who choose military service as a way to gain an education or as a career are denied opportunities not on the basis of their skills or capabilities, but solely because of their sex. Combat restrictions limit opportunities for training, education, assignment, and promotion. In addition, such restrictive policies deprive us of needed military strength.

BENEFITS OF REPEALING SEX-BASED RESTRICTIONS

Sex-based restrictions serve very little purpose. Administrative convenience has never been an argument that persuaded the courts. Sex-based restrictions permit unexamined prejudices that are detrimental to everyone.

The ERA will secure for military women the fair professional treatment that they have not fully gained to date. The ERA will offer consistency of treatment for military planners, and for women who want to plan lifelong career commitments. The ERA

would eliminate sex-based restrictions in statutes, regulations, and practice that have restrained career advancement without serving a clear military purpose and that have been a source of policy confusion and fluctuation.

REPEALING COMBAT-EXCLUSION

Exclusion from combat, sometimes defined as exclusion from "risk of hostile fire," is not a criterion that translates easily to military assignments. Women in traditional roles, such as nursing, have faced hostile enemy action, have been killed, and have been prisoners of war in the service of their country. In the Air Force and Navy, women's career advancement is hampered by statutory restrictions on combat. The Army, while free of statutory restrictions, has imposed its own combat exclusions, and it has gone through a number of iterations in the definition of combat. The Coast Guard, by contrast, has no statutory restrictions, and women serve well in a wide range of shipboard roles. Repeal of statutory provisions limiting the role of women has been sought on several occasions so as to leave military assignments to the discretion of military experts. Repeal will not occur without the ERA.

RATIONAL ADMINISTRATION OF SEX-NEUTRAL DRAFT AND MILITARY ASSIGNMENT POLICIES UNDER THE ERA

Under the ERA, sex-specific barriers in selective service laws and in assignment policies will have to be replaced with sex-neutral criteria. Tests of strength and aptitude will have to be reasonably related to job requirements. By enlarging the pool of qualified applicants for positions requiring specialized skills, ERA will strengthen, not weaken, national defense.

If a draft were reinstituted, women probably would be included, even without the ERA. Even with an ERA, the courts are unlikely to ignore evidence indicating disparate impacts in military assignments, mandated by such factors as differences in strength or the need to ameliorate sociological problems. While the burden of justifying neutral standards which effectively exclude women will be increased, congressionally examined and approved military assignment policies are not apt to meet Court disapproval.

MILITARY SERVICE AND THE ENHANCEMENT OF WOMEN'S STATUS AS CITIZENS

For all women, discrimination in the military has a profound effect on their status as citizens. Women's exemption from full military service interferes with their access to national leadership roles. Military service is often seen as a political credential. Military service has been credited with legitimizing the citizenship claims of other groups, particularly racial minorities. Nearly all men are subject to military call if they are needed in a national emergency. This is seen as a basic responsibility of citizenship—one that is currently denied to half the citizens of this country.

This Committee should support the Equal Rights Amendment because it will strengthen our ability to meet our military require-

ments and eradicate a remaining bastion of inequality in our society.

Summary of Questions Directed to Professor Cohen and Ms. Chayes

The questions explored the possible impact of the amendment on military law and policy. Three general questions guided the discussion: If an Equal Rights Amendment is ratified:

(1) To what extent would sex-based distinctions in current military law and policy be constitutional?

(2) How would so-called "neutral," e.g., not sex-based, standards be implemented to provide equal treatment of men and women in the military?

(3) What criteria might the courts use in resolving constitutional challenges to policies based on standards that—though neutral in intent—are differential in impact?

CONSTITUTIONALITY OF SEX-BASED DISTINCTIONS

Noting that current military law and policy authorize differing treatment of men and women, Senator Hatch asked the panel what effect an ERA would have on the constitutionality of sex-based distinctions pertaining to the draft, proposed deferments of mothers of dependent children, single-sex military units [usually combat units], combat duty, enlistment policies, and mental and physical aptitudes. Ms. Chayes and Mr. Cohen agreed that, under an ERA, exclusion of women from the draft would be ruled unconstitutional—overturning the Supreme Court's 1981 decision in *Rostker* v. *Goldberg* (in which the Court held that the registration of males but not females for possible conscription does not violate the due process clause of the fifth amendment). On the constitutionality of proposed deferments for mothers of dependent children, Ms. Chayes said that Congress could specify a deferment which would be sex-neutral, e.g., a hardship deferment, historically, provided for men in wartime, for *parents* bearing major responsibility for dependent children. Regarding the permissibility of single-sex military units, Ms. Chayes said that such units would be abolished, adding that most already have disappeared without the ERA. Mr. Cohen agreed that such units would be abolished under an ERA, but pointed out that combat units are still all male. Ms. Chayes also said that statutory provisions excluding women from combat would fall. Asked if any authorized military positions would be closed to women as a class, Ms. Chayes responded that restrictions would have to be based on capability as determined by standards that were reasonably job-related, emphasizing that they could not be sex-based.

Differences in policies related to enlistment requirements, such as minimum age, parental consent, educational credentials, and mental and physical aptitude, also would be unconstitutional, according to Ms. Chayes. Ms. Chayes repeated an opinion, previously expressed in her formal statement, that "gender-based restrictions serve very little purpose." Mr. Cohen disagreed with Ms. Chayes on this point, observing that in emergencies certain standards or requirements not directly correlated with a specific military job may

be vital, such as the superior stamina and upper body strength necessary to rescue a wounded comrade. Alluding to another kind of nonspecific military job requirement, he noted that in warfare women tend to be less of a psychological deterrent than men.

STANDARDS FOR IMPLEMENTING EQUAL TREATMENT: THE QUESTION OF INTENT VERSUS IMPACT [3]

Discussion of standards for implementing equal treatment of women in the military under an ERA included questions about so-called "neutral" standards, i.e., standards which neither favor nor disadvantage either sex: whether such standards would be required to be neutral in intent or neutral in impact (impact being generally regarded as easier to prove) regarding men and women; and whether such standards would require parity between the sexes, that is, whether such standards might be weakened to reduce any differential impact by application of affirmative action policies, for example.

In response to questions from Senator Hatch, Ms. Chayes said that neutral standards would be implemented as follows: Men and women would be required to meet the same standard of capabilty regarding enlistment and job assignment, that such tests would have to be varifiably job-related, and that they could not be deliberately devised to exclude one sex.

Senator Hatch asked specifically whether men and women would be required to meet the same physical and mental standards, for example. Affirming that they would, Ms. Chayes explained that there probably would be general physical and mental standards, which all men and women must meet to enter the military, and a more advanced set of specialty standards requiring specific aptitudes and capabilities, which men and women must meet for particular job assignments or job levels. Acknowledging that such standards might bar men and women differentially, Ms. Chayes said that all disparate impact would not be eliminated by sex-neutral standards. She emphasized, however, that the standards used would have to be carefully designed regarding sex-neutrality to pass the strict scrutiny of the courts and could not be a mask for malign or invidious discrimination.

In response to this argument, Mr. Cohen said that, although advocates of the Equal Rights Amendment claim that they are not concerned about disparate impact, as a practical matter there would be pressure to equalize percentages of men and women affected by any sex-neutral provision. As an example of such pressure, he noted that physical requirements at the military academies have been reduced to favor women. It was his opinion also that under an ERA there would be pressure to draft equal percentages of men and women, regardless of responsibility for dependent children, if a draft were reinstated.

Senator Hatch then raised the question of whether implementation of neutral standards would require parity between the sexes. Ms. Chayes replied that the parity required would not be one of numbers but one of qualifications. Mr. Cohen disagreed, repeating

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[3] For a discussion of "intent" and "impact," see introductory notes.

his previous statement that political pressures would tend to force parity in numbers.

Regarding the question of whether sex-neutral standards would be weakened to reduce any disparate impact by applying affirmative action policies, for example, Senator Hatch cited the 1974 *Schlesinger* v. *Ballard* decision (419 U.S. 498), in which the Supreme Court upheld a Navy policy of allowing female Navy officers a shorter time than male Navy officers in which to either qualify for promotion or face discharge. Senator Hatch asked if affirmative action policies of this sort would be allowed under the ERA. Responding that affirmative action was designed to correct past inequities in sex discrimination cases, just as in race cases, Ms. Chayes said that, in her opinion, there should not be an absolute prohibition of affirmative action under the ERA. She added that affirmative action should be allowed for a transitional period in situations where it is carefully designed to correct past discrimination based on sex, provided there has been a precedent for such action in race discrimination cases under the 14th amendment.

Dissenting from Ms. Chayes' argument, Mr. Cohen stated that an affirmative action policy such as the one Ms. Chayes outlined would create even greater difficulties in applying neutral standards as attempts were made to deal with disparate impact problems. To illustrate, he repeated his earlier concern that there would be further weakening of physical standards. Few women could meet the present physical standard for the combat branches, he said, noting that service in these branches is important in attaining promotion to the top rank of the military. He concluded, therefore, that there would be affirmative action programs to compensate for the paucity of women on the promotion ladder to the top ranks, and that these affirmative action efforts would "disrupt the ethos of the Armed Forces" with regard to promotion.

Taking the discussion one step further, Senator Hatch asked if affirmative action programs "which are designed to provide preferences to one sex" would be consistent with the Equal Rights Amendment. Ms. Chayes reiterated her previous statement that affirmative action would be used only to correct prior discrimination.

Senator Hatch asked if Ms. Chayes meant that the ERA should not be interpreted "absolutely," i.e., to bar all differential treatment based on sex, as many proponents have suggested. Ms. Chayes said that most people who have studied the ERA believe there are two areas in constitutional interpretation which need further examination: Affirmative action and the question of essential physical differences.

CRITERIA TO BE EMPLOYED BY COURTS IN JUDGING DISCRIMINATION ALLEGED UNDER POLICIES THAT ARE FACIALLY NEUTRAL BUT DISPARATE IN IMPACT

Senator Hatch referred to a passage in Ms. Chayes' statement in which she said that under the ERA, the courts might consider evidence of the disparate impact of military policies when anlayzing cases of alleged sex discrimination. Saying that he understood the 14th amendment to apply only where there is evidence of purposeful discrimination, or disparate intent, he asked Ms. Chayes which

would be the appropriate analysis under the ERA—the intent analysis as it exists under the 14th amendment or the disparate impact analysis that has been advanced by certain civil rights groups. Ms. Chayes responded by saying that, as she wished to do justice to this difficult and scholarly problem, she would submit her answer in writing.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON ABORTION RIGHTS

INTRODUCTION

On January 24, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the impact of the Equal Rights Amendment on abortion rights.

Ann E. Freedman, associate professor of law, Rutgers University School of Law, Camden, New Jersey, said that the ERA would have no practical effect on the Supreme Court decisions concerning abortion and abortion funding and she urged adoption of the amendment on its own merits.

John T. Noonan, Jr., professor of law, University of California at Berkeley, Berkeley, California, opposed passage of the ERA on grounds that it would give new strength to legal abortion rights by providing a substitute basis, should the Court abandon the privacy doctrine. He argued that the amendment would require public funding of abortions, eliminate so-called "conscience clauses" for medical personnel regarding participation in abortion procedures, and affect tax exemptions for schools and colleges that discourage abortion due to religious tenets.

SUMMARY OF STATEMENT BY ANN E. FREEDMAN, ASSOCIATE PROFESSOR OF LAW, RUTGERS UNIVERSITY SCHOOL OF LAW, CAMDEN, NEW JERSEY

Regarding any specific impact that the ERA might have on abortion rights, Professor Freedman said that the ERA would have no practical effect on Supreme Court decisions concerning abortion and abortion funding due to the Court's commitment to the right to privacy doctrine in reviewing abortion restrictions and the fact that the standard of review (strict scrutiny) would be the same under either the privacy doctrine or the ERA. Thus, she opposed the addition of an antiabortion amendment—or any other specific amendment—as both "unnecessary and undesirable," said the issue of abortion was not germane to congressional consideration of the ERA, and urged adoption of the amendment on its own merits.

SUPREME COURT COMMITMENT TO REVIEW OF ABORTION RIGHTS UNDER THE CONSTITUTIONAL RIGHT TO PRIVACY

The ERA will have no practical impact on Court decisions concerning abortion rights because of the Court's demonstrated commitment to an alternative basis for analysis, the constitutional right to privacy. If in the future the Court wished to invalidate abortion funding restrictions, for example, it would do so under the right to privacy and not under the ERA.

Under the right to privacy, the Supreme Court has held that restrictions on abortion choice are subject to strict constitutional scrutiny. Under the ERA, pregnancy-related laws also would be subject to strict scrutiny. Since both doctrines mandate the same level of scrutiny, there is no reason to expect the Court to change its basis of analysis in abortion cases from the right to privacy doctrine [1] to the Equal Rights Amendment, or to reach different results were it to do so.

THE USE OF THE RIGHT TO PRIVACY DOCTRINE REGARDING PUBLIC FUNDING OF ABORTIONS

In *Harris* v. *McRae* (448 U.S. 297 (1980)), the Court, adhering to the strict scrutiny standard in its review of governmental restrictions on abortion choice, upheld the Government's power to favor childbirth over abortion in the publicly funded medicaid program. The basis for the *McRae* ruling was that this limitation on the use of governmental funding power was not a restriction on abortion choice, only a restriction on public funding.

Representative Henry Hyde, in previous testimony, and Professor Noonan, in today's testimony, argue that the ERA would provide an opportunity for expanded judicial activism regarding abortion decisions, leading the Court to abandon its ruling in *McRae* and to require public funding of abortions. I would suggest, to the contrary, that a majority of the Justices are committed to the distinction they drew in *McRae* between limiting governmental restrictions on the right of an individual to choose a privately funded abortion and allowing a governmental preference regarding childbirth through a public medical assistance program. There is nothing in the ERA to cause them to abandon that distinction.

Moreover, the outcome in other cases involving abortion choice has depended on the Justices' views about the extent to which abortion choice has been affected by a given governmental action, not on the doctrinal source within the Constitution or the standard of review applied.

WHY THE ERA WILL NOT REPLACE THE RIGHT TO PRIVACY AS THE BASIS FOR SUPREME COURT RULINGS CONCERNING ABORTION AND ABORTION FUNDING

When Justices dissenting from the majority opinion in *McRae* had the opportunity to use the argument that discrimination on the basis of pregnancy was sex discrimination (under the 14th amendment—the same argument that would be available under an ERA), they did not do so. Instead, they emphasized the importance of the constitutional right to privacy and criticized the majority's distinction between restrictions on abortion choice, on one hand, and funding provisions favoring normal childbirth over abortion, on the other. If the dissenters felt that an analysis based on sex discrimination (under the equal protection clause of the 14th amendment) was more appropriate or more powerful than an analysis based on privacy as a tool for deciding abortion funding issues,

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[1] In *Roe* v. *Wade* (410 U.S. 113 (1973)), the Court characterized the right to privacy as grounded in "the Fourteenth Amendment's concept of personal liberty."

it is logical to assume that they would have used such an analysis in *McRae*.

Arguments that limitations concerning abortion are discriminatory on the basis of sex are not new. The important question is whether they will have any practical effect on the Supreme Court's decisions in the area of abortion. The answer is that sex discrimination arguments will not have any such effect, and the privacy analysis will continue to be used in constitutional debates about abortion for the foreseeable future.

WHY THE ERA SHOULD BE ADOPTED WITHOUT AN ANTIABORTION AMENDMENT OR ANY OTHER SPECIFIC AMENDMENTS

The Constitution is a broad charter of governmental powers and personal rights and, as such, is properly written in general terms. The time-honored source for amplifying the meaning of constitutional language is the legislative history, and it should be relied on for that purpose. It is probable that the introduction of any so-called "clarifying" amendments, whether adopted or not, would therefore cast doubt on the weight that should be placed on the ERA's legislative history as a guide to judicial interpretation.

SUMMARY OF STATEMENT BY JOHN T. NOONAN, JR., PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY, BERKELEY, CALIFORNIA

Professor Noonan opposed passage of the ERA on the grounds that it would give new strength to legal abortion rights by providing a substitute basis, should the Court abandon the privacy doctrine. In addition, he said the amendment would require Federal and State funding of abortions, eliminate so-called "conscience clauses" for medical personnel regarding participation in abortion procedures, and affect tax exemptions for certain schools and colleges that have policies discouraging abortion due to religious tenets.

THE PRIVACY DOCTRINE VERSUS THE ERA AS A BASIS FOR ABORTION RIGHTS

Up to the present time, the Supreme Court has used the privacy doctrine as its principal basis for rulings on abortion rights cases. However, if the privacy doctrine were abandoned following passage of the ERA, the amendment, which specifically bans discrimination "on account of sex," would have a substantive impact on such litigation and would provide a substitute rationale. Guidance regarding the way Federal judges might construe the amendment is not found in cases decided under the equal protection clause of the 14th amendment or the equal protection component of the 5th amendment,[2] but in the Court's changing position on title VII of the Civil Rights Act, which closely parallels the ERA in respect to sex discrimination.

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[2] See footnote 1 on p. 42.

IMPACT OF THE ERA ON LITIGATION INVOLVING ABORTION RIGHTS

Although the ERA could be the means of imposing certain limits on the right to an abortion, the net impact of the amendment would be to expand abortion rights. The amendment would require governmental funding of elective abortions, invalidate the exemption from performing the operation for medical personnel and institutions objecting on grounds of conscience to the performance of abortions, deny tax exemptions to educational institutions discouraging abortion among their students, and provide a new constitutional basis for establishing abortion rights. On the other hand, it is also possible that the ERA would provide two limitations on abortion:

(1) By establishing a constitutional basis for statutes extending to fathers a share in the decision to abort a pregnancy; and

(2) For statutes prohibiting abortion on the basis of the sex of the unborn child, e.g., to prevent parents from terminating a pregnancy in which the sex of the child is not the one desired (believed to affect female fetuses disproportionately).

BASIS FOR PROBABLE CHANGES IN IMPACT

For guidance as to the probable impact of the ERA on abortion, we can look at two tests—one enunciated in the legislative history of the 1972 amendment and one developed by the Supreme Court in expounding a statute parallel to the ERA, title VII of the Civil Rights Act.

(1) Strict scrutiny and the "unique physical characteristics" test

The report of the Senate Judiciary Committee on the ERA in 1972, "Equal Rights for Men and Women," stated that the ERA would prohibit discrimination on the basis of a person's sex with one important exception—the amendment would not prohibit reasonable classifications based on characteristics that are unique to one sex. Under this exception, the key question is whether abortion is a procedure so dependent on a unique physical characteristic of women that an amendment guaranteeing equal rights would have no relevance. The *Yale Law Journal* article (previously mentioned), which was made a part of the legislative history of the proposed amendment in both the House and Senate, reiterated the "unique physical characteristics" exception and said that any laws including such an exception would have to be reviewed for constitutionality under the strict scrutiny doctrine.

The question is whether abortion would be a procedure excepted on the basis of the "unique physical characteristics" test enunciated in the legislative history. Two authors of the *Yale* article, subsequently writing in regard to the sex discrimination decision in *General Electric Company* v. *Gilbert*, argued that, since abortion shares some characteristics with other medical procedures, e.g., it is an operation and results in temporary disability, it does not pass the "unique physical characteristics" test under strict scrutiny, that only a statute relating "precisely and exclusively" to a unique physical characteristic can survive strict scrutiny. By this understanding of the ERA, any denial of abortion rights would be constitutionally improper.

(2) Strict scrutiny and the "but for" test

Not all proponents of the ERA agree that under ERA abortion would be excepted under the "unique physical characteristics" test. Some interpreters of State ERA's argue that the more a distinction is based on a unique feature related to sex, the more likely it is to be discriminatory. This argument has been the basis for suits brought under State ERA's in Hawaii, Massachusetts, and Pennsylvania to require funding of abortions under medicaid. According to plaintiffs in these cases, the withdrawal of medicaid funding for abortion (a procedure performed only on women) while continuing to fund other medical procedures sought by both sexes, was tantamount to denial of equal rights on account of sex.

This argument has been adopted by the Supreme Court in interpreting a statute parallel to the ERA, title VII of the Civil Rights Act in three recent decisions, [3] and is known as the "but for" test. In these cases, the Court ruled that the evidence showed that *but for* a person's sex, that person would not be treated differently from anyone else, and that such treatment by anyone subject to title VII violates Federal law. This test eliminates even such exceptions as the "unique physical characteristics" test, once believed to be compatible with the ERA. It is widely recognized that title VII sex discrimination cases are a valuable precedent for knowing how the ERA will be interpreted, since what is true under the language of title VII, which prohibits discrimination "because of sex" or "on the basis of sex," would likely be true under the parallel wording of the ERA which prohibits discrimination "on account of sex."

CONSEQUENT EFFECT OF THE ERA ON ABORTION AND ABORTION FUNDING

As long as there is no Equal Rights Amendment, the Court will use the right to privacy analysis in ruling on abortion cases. However, if the amendment were enacted, the situation would change. Although the Court has seriously considered the equal protection arguments used in abortion funding cases, the Court has not been prepared to implement its new title VII approach (e.g., application of the "but for" test) regarding the constitutional provisions of equal protection, since there is no parallel language to "because of sex," or "on account of sex," or "on the basis of sex" in the equal protections provision of the Constitution. The new language of the ERA is crucial.

If, after the ERA were enacted, the Court should abandon the right to privacy argument with regard to abortion, on grounds that this interpretation stretched the Constitution beyond reasonable limits, and thus invalidate the *Roe* v. *Wade* decision on which it is based, the Court's path would be blocked by the "but for" test, since, with the ERA in place and "but for" the criterion, statutes regulating abortion would be unconstitutional.

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[3] *Los Angeles Department of Water and Power* v. *Manhart* (435 U.S. 702 (1978)), *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris* (463 U.S. 1073, 103 S. Ct. 3492 (1983)), and *Newport News Shipbuilding and Dry Dock Co.* v. *Equal Employment Opportunity Commission* (462 U.S. 669, 103 S. Ct. 2622 (1983)).

DILEMMA OF PROPONENTS OF THE ERA

Given the legislative history of the "unique physical characteristics" test and recent Supreme Court precedents on title VII, it is difficult to believe that informed proponents of the ERA can maintain that there is no connection between the ERA and abortion. If proponents do not want the ERA to be affected by the abortion controversy, they have an easy option: To agree to an amendment of the ERA specifying that nothing in the ERA confers a right to abortion or the funding of abortion.

The dilemma that the proponents of the ERA face is that if they acknowledge that the ERA will have an enormous impact on abortion legislation, abortion litigation, and educational and medical institutions opposed to abortion, they will lose crucial votes in Congress and State legislatures. But if they disclaim any effect of the ERA on abortion, they will abandon the intent of the legislative history of the amendment and the Supreme Court's interpretation of title VII.

SUMMARY OF QUESTIONS DIRECTED TO PROFESSORS FREEDMAN AND NOONAN

The questions addressed to Professors Freedman and Noonan were based primarily on their testimony and concerned the following issues:

(1) Professor Noonan's conclusions regarding effects of an Equal Rights Amendment in decreasing restrictions on abortion rights;

(2) Professor Freedman's conclusions regarding the continued reliance by the Court on the privacy doctrine with no consequent effect on abortion rights; and

(3) Methods of precluding application of the amendment to abortion and abortion funding, e.g., the question of amending the amendment versus reliance on the amendment's legislative history.

(1) PROFESSOR NOONAN'S CONCLUSIONS REGARDING THE EFFECTS OF AN ERA

Senator Metzenbaum began by challenging Professor Noonan's conclusions that the ERA would mandate Federal and State funding of abortion, sweep away all present restrictions on abortions, end conscience clause exemptions for doctors, nurses, and hospitals, threaten the tax exemption of schools whose policies discourage abortion, and provide a new basis in the Constitution for abortion rights. He noted that the link between these conclusions and the ERA seemed tenuous and asked Professor Noonan to review the legal arguments.

(a) The title VII precedent for ERA interpretation

Professor Noonan responded by citing a precedent under title VII of the Civil Rights Act, developed by the Supreme Court in three recent decisions—the "but for" test, (see p. 45) which he said showed how the ERA would be interpreted. He explained that under this test, illegal sex discrimination is deemed to occur if the

evidence shows that *but for* a person's sex that person would not be treated differently from anyone else. This precedent would be applied under the ERA, he said, because of the parallel language of the proposed amendment and title VII: the ERA forbids discrimination "on account of sex" and title VII forbids discrimination in employment "because of sex" or "on the basis of sex." Professor Noonan concluded that if you take the "but for" test and apply it to publicly funded services under medicaid, denial of one service—abortion—would be discriminatory, e.g., "but for" the fact that the recipient is a woman, she would receive a necessary medical service, in this instance, abortion.

In response to a question interjected by Senator Hatch, Professor Freedman agreed with Professor Noonan that the ERA would provide a mandate to consolidate changes brought about by title VII.

Pursuing this line of questioning, Senator Metzenbaum asked Professor Noonan how the ERA would mandate abortion funding. Professor Noonan answered that under the amendment, denial of abortion on the basis of sex would be unconstitutional; therefore the "unconstitutionality" would have to be remedied. Senator Metzenbaum disagreed with the argument that there is discrimination in not providing abortion funding, since funding is not provided for many services, adding that there is no obligation for Congress to provide funding. Professor Noonan responded that if other medically necessary services are publicly funded and this one is not, then omission of public funding for abortion would be unconstitutional sex discrimination under the precedent established in the *Newport News* decision.[4]

(b) The ERA and tax-exempt status

Regarding the effect of the ERA on the tax-exempt status of schools whose policies discourage abortion, Professor Noonan cited the *Bob Jones* case in which the Court said that to qualify for a tax exemption, a public charity must not be "at odds with the community conscience." Professor Noonan noted that the Court also said that to qualify for a tax exemption, a charity must "demonstrably serve and be harmony with the public interest." Thus, he concluded, since denial of abortion would be sex discrimination under the amendment, tax exemptions for schools that discourage abortions would be unconstitutional and schools would have to choose between tax exemptions and their moral and religious principles.

Taking issue with this point, Senator Metzenbaum commented that there are many instances in which the common conscience varies from the provisions of the Constitution, and yet constitutional rights are recognized.

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[4] In *Newport News*, the Court held illegal under title VII a disability plan covering the medical expenses of the spouses of female employees but not the medical expenses for pregnancy of the spouses of male employees, ruling that the basis for the discrimination was the unique physical characteristic of women—only women could have babies; only the medical treatment which childbearing required was denied coverage. The Court thus employed the "but for" argument, i.e., *but for* the sex of spousal beneficiaries, they would have been treated differently.

(2) PROFESSOR FREEDMAN'S CONCLUSIONS REGARDING THE EFFECT OF THE ERA ON ABORTION RIGHTS

Responding to a question from Senator Hatch regarding the adoption of the "but for" test (see p. 45) in the *Newport News* decision, Professor Freedman disagreed that the Court had so acted, noting that the case involved a two-step analysis. She said, first, the Court affirmed that discrimination on the basis of pregnancy is sex discrimination; and second, the Court applied the "but for" test, not to the *women's* spousal right to be covered for pregnancy under the company medical plan, but to the *men's* right to coverage for their wives. On this basis, she said that the Court decision in *Newport News* referred only to such facial discrimination against male employees and it was to this facial discrimination that it applied the "but for" test.

Taking issue with Professor Freedman, Professor Noonan stated that in *Newport News* the Court held that the company practice of covering all medical necessities for the wives of their male employees under its comprehensive medical plan, with the exception of pregnancy, constituted sex discrimination, regardless of whether it applies to the male or female.

(a) Public funding of abortions

Concerning the issue of public funding of abortions, Senator Hatch asked Professor Freedman what is the present state of the law on public funding; whether, in her opinion, there are any limitations on such funding; and whether laws such as the Hyde amendment are clearly constitutional. Professor Freedman responded by saying that *Harris* v. *McRae* (upholding limitations on public funding) is the governing law on the subject, together with subsequent cases on the same issue. Senator Hatch remarked that in *Harris* the plaintiffs argued that the amendment violated women's right to privacy and the equal protection clause of the 14th amendment (on grounds that the amendment discriminated against indigent women), and that the Court rejected these arguments. He then asked whether the ERA would change the outcome of such a case in any way. Professor Freedman answered that, as the plaintiff's arguments were based on the constitutional right to privacy and the application of the equal protection clause to indigents, who are not a protected class, the ERA would not change the outcome. She added that an argument also could be made that the Hyde amendment discriminated on the basis of sex, but the ERA would not change the outcome of this case either, since abortion restrictions are based on a unique physical characteristic and are, thereby, not a sex classification.

(b) Strict scrutiny and the Hyde amendment

In response to Senator Hatch's question concerning review of the Hyde amendment under strict scrutiny if the ERA passes, Professor Freedman answered that the standard of review under the privacy doctrine and under the ERA is the same—strict scrutiny. She added that while the Court made certain distinctions in the *Harris* decision, based on whether or not the Hyde amendment restricted a woman's right to choose, it did not apply a different standard of

review. The distinction drawn in the *Harris* decision, she said, was that a law prohibiting public funding of abortions different from a law making abortion a crime, e.g., a law forbidding abortion *per se*.

(c) Suspect classification and the Hyde amendment

Regarding the creation of a suspect class—sex—under the ERA, Senator Hatch asked Professor Noonan to comment on a passage from the *Harris* decision which stated that the Hyde amendment violates no constitutionally protected, substantive rights and that it was not predicated on a constitutionally suspect classification. Professor Noonan asserted that the decision framework in abortion funding cases, such as *Harris*, would change once sex became a suspect classification under the ERA. Disagreeing, Professor Freedman argued that, although the ERA would make sex a suspect classification, the Court would continue to base its rulings regarding abortion on the "unique physical characteristics" exception (see p. 44). She explained that the ERA would not make sex a suspect class. She also stated that although unique physical characteristics classifications would not be facial sex classifications under the ERA, that they would be related to sex discrimination in such a way as to make them subject to strict scrutiny.

(d) The unique physical characteristics exception

Regarding the issue of the unique physical characteristics exception claimed by Professor Freedman, Senator Hatch asked if under the language of the Equal Rights Amendment a pregnancy classification such as the Hyde amendment would be subject to the unique physical characteristics exception. Answering yes, Professor Freedman said that the unique physical characteristics argument was developed in the *Yale Law Review* article and subsequently incorporated into the legislative history of the 1972 amendment. She added that the unique physical characteristics argument was later discussed by the dissenters to Supreme Court decisions in the *Gilbert* and *Geduldig* cases, thus creating case law analogous to the unique physical characteristics argument.

Differing with Professor Freedman's thesis, Professor Noonan said that although the unique physical characteristics argument had been adopted "to some extent" in the Senate report, it has not stood up in the Supreme Court in title VII cases and that Professor Freedman herself had rejected it in the *Gilbert* case by saying that pregnancy was not unique but shared characteristics with other operations. Professor Freedman answered that in *Gilbert* the question was whether an employee should be compensated for lost time because of disability and that in this context there is not anything unique about pregnancy.

Senator Hatch then cited a Library of Congress analysis which he said concludes that the ERA would mandate public funding for abortions; he asked Professor Freedman if she disagreed with this research. Professor Freedman answered that the analysis equated unique physical characteristics with facial sex classifications and that she did not agree that they were the same.

(e) Rights of husbands in abortion decisions

Regarding the question of whether the ERA would expand a husband's rights in an abortion decision by his spouse, Senator Hatch cited the 1976 Supreme Court decision in *Planned Parenthood of Central Missouri* v. *Danforth* (428 U.S. 52 (1976)), in which the Court ruled that the husband of a pregnant woman did not have the right to veto her decision to have an abortion. Noting that the ERA is designed to equalize the roles of husband and wife in many areas of domestic relations, he asked Professor Freedman if the ERA would have any impact on the *Danforth* decision. Professor Freedman responded that the ERA would not affect *Danforth* because under the privacy doctrine the woman is given the right to decide; that, moreover, under the Court's interpretation in *Roe* v. *Wade* the State does not have veto power; and that the Court, therefore, could not delegate to a third party, e.g., the husband, the right to exercise a veto. Professor Noonan differed, saying that the outcome of a suit on this point would depend on how highly the Court valued the abortion right against equal rights (the ERA), but that it would certainly be a point of considerable substance that could reasonably be argued.

(f) Testing the sex of a fetus with disproportionate effect on females

Regarding the question of abortion when the sex of the fetus is not the one desired by its prospective parents, Senator Hatch asked if it would be permissible for a publicly funded hospital to test the sex of a fetus if the result is that a disproportionately high number of girl infants are aborted, compared to boy infants. Professor Freedman said that the question would be decided on privacy grounds and that, although the Court has been weighing what kinds of State interests would be sufficient to justify restrictions on abortion, this particular interest had not yet been discussed. Professor Noonan, disagreeing, said that he could not understand why the ERA would be treated as irrelevant by the Court or why the Court would not use it.

(g) Effect on tax-exempt status

Concerning the issue of tax exemptions for educational institutions with restrictive policies on abortion, Senator Hatch asked if such policies could be viewed as sex discrimination under the ERA and the exemptions challenged on those grounds. Professor Freedman answered that in *Bob Jones* the Court ruled that it is for Congress to decide what tax exemption policy should be and that this case would be no different. She said that if Congress disagrees with the *Bob Jones* opinion, it can reverse it. Professor Noonan asked how a Court with a strong view based on a constitutional text (the ERA) regarding the requirements of the "community conscience" could be confined to congressional intent. He said it would not be easy to keep tax exemptions for such schools once the ERA were in place.

(3) AMENDING THE ERA VERSUS USE OF LEGISLATIVE HISTORY TO PRECLUDE APPLICATION TO ABORTION

In response to questions from Senator Hatch regarding prevention of mandatory funding of abortion under ERA, Professor Freedman responded that the legislative history of a contitutional amendment is the firmest guide to its meaning and that it is the responsibility of Congress to write the legislative history. She added that if the legislative history is clear regarding the meaning of the amendment, e.g., if it does not mandate abortion funding, then that intent will be controlling in judicial interpretations.

Regarding the question of amending the amendment to preclude mandatory funding of abortion, Senator DeConcini asked Professor Freedman if she would agree to any amendment. Professor Freedman answered that it is not necessary to amend since the legislative history controls, adding that amendments cast negative implications on the legislative history as a guide.

Senator DeConcini asked if a statute preventing application to abortion funding would survive the strict scrutiny test. Professor Noonan responded that he did not believe it would. Differing with Professor Noonan, Professor Freedman said that such legislation would stand or fall based on the privacy analysis, noting that if such a statute were consistent with the existing medicaid laws that were upheld in *Harris*, it would be ruled constitutional on that basis, whether or not the ERA is passed.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON VETERANS' PROGRAMS

INTRODUCTION

On February 21, 1984, the Senate Subcommittee on the Constitution received testimony from nine witnesses, sitting as two panels, regarding the impact of the Equal Rights Amendment upon veterans' programs.

PANEL I

The witnesses in the first panel and their positions regarding the amendment were as follows:

(1) Michael Meloy, a Helena, Montana, attorney, discussed his pending suit challenging the constitutionality of the Montana veterans' preference statute to illustrate the potential effect of the ERA on courts and legislatures.

(2) Dean Phillips, representing the Military Order of the Purple Heart, spoke in opposition to the ERA based on the statements of certain women's groups with respect to veterans' preference and his concern regarding the possible effect of the ERA in overturning the decision in *Massachusetts* v. *Feeney* (442 U.S. 256 (1979)).

(3) Charles Shanor, Dean of the Emory University School of Law, said that he did not believe that the ERA would overturn even absolute, lifetime veterans' preferences and said that he favored enactment of the amendment, if only for its symbolic value.

(4) Gary L. McDowell, Professor at Tulane University, opposed passage of the ERA, saying that the practical effect of the proposed amendment is "ambiguous," that the judiciary is somewhat divided on the question of intent versus impact, and because of the clear position of proponents of the amendment who would litigate in favor of an impact standard. Thus, he said that the ratification of the ERA would be likely to lead to the abandonment of the discriminatory intent analysis, as in *Feeney*, in favor of an analysis based on discriminatory impact.

PANEL II

The witnesses in the second panel and their positions regarding the amendment were as follows:

(1) Donald B. Schwab, representing the Veterans of Foreign Wars of the United States, proposed amending the ERA to preclude its application to veterans' preference and cited statistics to disprove the argument that women are disadvantaged in Federal employment because of veterans' preference.

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(2) E. Phillip Riggin, representing the American Legion, outlined the history of verterans' preference, including its present provisions, and stated the American Legion's support for the program. He urged that specific language be added to the Equal Rights Amendment to protect veterans from any potential court decision holding veterans' preference or veterans' programs unconstitutional.

(3) June A. Willenz, representing the American Veterans Committee (AVC) said that the AVC supported the ERA and saw no conflict between the ERA and veterans' preference. Regarding veterans' preference in public employment and the provision of other veterans' benefits, she said the AVC supports sufficient veterans' preference to facilitate veterans readjustment to civilian life with a minimum of economic loss and hardship but not the total, lifetime preference upheld by the decision in *Feeney*. She said the AVC also supports expansion of the number and roles of women in the military as a means of eliminating sex discrimination in all aspects of daily life.

(4) Dennis K. Rhoades, representing the Vietnam Veterans of America (VVA), testified that the VVA strongly supports both veterans' preference and the Equal Rights Amendment, since both address the same principal: parity. However, because of past legal challenges to veterans' preference on the basis of sex discrimination, the VVA urged that Congress assure that veterans' preference rights and benefits are adequately protected by means of an unequivocal expression of congressional intent regarding this principle as a part of the legislative history of the amendment.

(5) David J. Passamanek, representing the American Veterans (AMVETS), emphasized that organization's belief that veterans' preference in Civil Service hiring and retention is an earned, lifetime right and urged that language be included in the amendment specifically excluding from the effects of the amendment all veterans' preference and entitlement programs.

THE MONTANA SUIT

Mr. Meloy stated that in 1983 he began litigating a suit under the Montana State ERA to challenge constitutionality of the Montana State veterans' preference statute, a suit which may serve as a basis for considering some of the issues before the Committee concerning the impact of the ERA on veterans' preference. Litigation was initiated following a ruling by the Montana Supreme Court in which the preference was found to be absolute, i.e., any person with veterans' preference who applied for a job covered by the statute and who was at least minimally qualified must be hired, regardless of the qualifications of other applicants. The preference also was found to be absolute with regard to spouses of veterans. The suit claims that the Montana statute, as interpreted by the State supreme court, violates the Montana ERA which says no person may be discriminated against in the exercise of civil and political rights on account of sex.

In response to the suit, the Montana State Legislature, meeting in special session, modified the State veterans' preference statute

so that the preference now extends only to the veteran, unless he is unable to utilize it; must be used within a 5-year period after leaving the service; and only is exercised to give the veteran preference for a job if everyone applying is substantially equal in qualification.

EFFECT OF THE MONTANA STATE ERA ON THE STATE LEGISLATURE AND THE STATE COURT

This suit is illustrative of the potential impact of the Federal ERA on legislatures. The Montana body had an opportunity to assess the substantial impact of the statute on hiring in Montana and at the same time to accomplish the goals of veterans' preference, that is, to help the veteran become readjusted. The suit also illustrates the potential impact of the amendment on the legal system which, because of the legislature's action, has before it a working example of how men and women can be treated equally under the law.

SUMMARY OF STATEMENT BY DEAN PHILLIPS, MILITARY ORDER OF THE PURPLE HEART

Mr. Phillips spoke in opposition to the ERA based on the statements of certain women's groups with respect to veterans' preference and his concern regarding the possible effect of the ERA in overturning the decision in *Massachusetts* v. *Feeney*.[1]

NEED FOR AN AMENDMENT TO PROTECT VETERANS' PREFERENCE UNDER AN ERA

While the Military Order of the Purple Heart has not previously taken a position for or against the Equal Rights Amendment, it is now giving serious consideration to seeking an amendment to the ERA to protect veterans' preference. Such an amendment, similar in wording to title VII of the Civil Rights Act of 1964, might read as follows: "Nothing contained in this [amendment] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans."

We have several reasons for considering such an action. Women's groups, such as the League of Women Voters and the National Organization for Women (NOW), have advised Congress that the ERA would allow a successful legal challenge to veterans' preference, overturning the Supreme Court decision in *Feeney*. Moreover, although the by-laws of NOW mandate "direct action to bring women into full participation in society, exercising all the privileges and responsibilities thereof in truly equal partnership with men," NOW in particular and women's groups in general did not make a sincere effort to exercise equal responsibilities regarding military service.

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[1] The decision in *Feeney* upheld the constitutionality of a State veterans' preference statute giving absolute preference in civil service hiring to veterans over nonveterans, despite its negative effect on women applicants. The Court held that the preference was neutral on its face, that it benefitted both male and female veterans, and that it was not intended to discriminate against women as a class.

RESPONSE OF WOMEN AND WOMEN'S GROUPS TO MILITARY NEEDS

During the Vietnam War, while enjoying the privilege of draft exemption, most women did not respond to calls for women volunteers, demand to exercise the responsibilities of service in equal partnership with men, or object to lack of equal employment opportunities with respect to military service. In 1971, at the end of the Vietnam War, NOW passed a resolution opposing special preference for veterans that, in effect, opposes preference or programs for even blind and paraplegic veterans. Only after President Carter proposed in 1980 that both young men and women should be required to register for the draft did NOW state in an amicus brief filed regarding the *Feeney* case that registration for the draft must be imposed "equitably on all members of society who are capable of serving, irrespective of gender." In 1983, NOW and other women's groups announced that enactment of the ERA is necessary for an attack on veterans' preference as upheld in *Feeney*, e.g., for an attack on absolute preference.

WHAT THE FEENEY CASE ILLUSTRATES

In *Feeney*, the Supreme Court upheld absolute preference for veterans in the Massachusetts Civil Service, observing that the statute was neutral on its face, benefitted both male and female veterans, and was not intended to discriminate against women as a class. In reaching its decision, the Court cited the standard developed in *Washington* v. *Davis* (426 U.S. 229 (1976)), that in order to prove invidious discrimination under the equal protection clause of the 14th amendment, it must be proved that there was actual *intent* on the part of the legislature to discriminate against women when it enacted the preference statute.

Female nonveterans are not a protected class requiring use of the strict scrutiny test and the veterans' preference law must only demonstrate a rational basis to survive an equal protection challenge. Mr. Phillips stated that his concern of organization regarding the *Feeney* case was that Federal veterans' preference statutes had a legislative history similar to the Massachusetts statute in question and that an adverse decision in *Feeney* could lead to an avalanche of constitutional challenges.

SUMMARY OF STATEMENT BY CHARLES SHANOR, DEAN, EMORY UNIVERSITY SCHOOL OF LAW

Professor Shanor said that he did not believe that the ERA would overturn even absolute, lifetime veterans' preferences [2] and said he favored enactment of the amendment if only for its symbolic value.

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[2] E.g., preferences in hiring accorded to veterans with at least minimal qualifications over all other nonveteran applicants and accorded during RIF actions that may be used by veterans without limit during their working years.

POSITION IN FAVOR OF THE ERA AND IN OPPOSITION TO ABSOLUTE LIFETIME VETERANS' PREFERENCE

Professor Shanor said he supported the ERA more for its symbolic value than for any specific changes it might bring legally. Although he was not opposed to some lesser veterans' preferences (e.g., preference regarding initial hiring), he thought absolute lifetime preferences encouraged economic inefficiency and severely disadvantaged women in obtaining government jobs.

WHY NO PROBABLE EFFECT OF THE ERA ON VETERANS' PREFERENCE

(1) A facially neutral statute makes no classification "on account of sex" within the meaning of the ERA

Veterans' preference statutes seldom distinguish between men and women and are, therefore, facially neutral—both men and women receive the same benefits.

(2) Disparate impact is not the same as denial of equal rights

Because an overwhelming percentage of this Nation's veterans are male, the group benefitting from veterans' preference is almost exclusively male. In the *Feeney* decision, the Supreme Court held that the Massachusetts absolute preference statute did not deny "equal protection of the laws" to women since the statute contained no discriminatory *intent* and that disparate impact alone does not raise 14th amendment issues. The Court reached its conclusion even as it acknowledged that the Massachusetts preference statute had an enormous, disparate impact on women, that this impact was readily foreseeable at the time the preference was legislated, and that a major reason for the impact was that women had been precluded by statute and military regulation from entry into the Armed Forces. The Court found that when "the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when the statutory history and all of the available evidence affirmatively demonstrate" lack of discriminatory *intent*, then the inference of discriminatory intent has not been "ripened into proof."

(3) Application to the ERA

Under the ERA, the same problem would arise: Is a statute having a disparate impact one that denies "equality of rights . . . on account of sex?" It seems unlikely that the Court would construe the ERA in this way for three reasons. First, such a construction would establish a broader scope for the ERA on sex discrimination issues than the 14th amendment has on race discrimination issues. Second, the Supreme Court has been reluctant to incorporate antidiscrimination impact phrases into the Constitution, even when equivalent phrases in statutes might be construed as establishing impact standards. Third, an impact standard could subject an enormous range of legislation to judicial review.

PROBABLE OUTCOME IF THE ERA WERE TO BE APPLIED TO FACIALLY NEUTRAL STATUTES HAVING A DISPARATE IMPACT

Facially neutral veterans' preference statutes make no classification "on account of sex" within the meaning of the ERA and are thus outside the ERA's reach. Only in the unlikely event that an impact standard is adopted under the ERA will the courts reach the question of whether veterans' preferences deny "equality of rights" to women. If the courts ever reach this question, it is unlikely that the government will be able to show sufficiently compelling reasons for giving civilian job preferences to veterans to save these statutes.

SUMMARY OF STATEMENT BY GARY L. MCDOWELL, PROFESSOR, TULANE UNIVERSITY

Professor McDowell opposed passage of the ERA because the practical effect of the proposed amendment is "ambiguous," the judiciary is divided on the question of intent versus impact, and due to the clear position of proponents of the amendment who would litigate in favor of an impact standard. Thus, he said that the ratification of the ERA would be likely to lead to the abandonment of the discriminatory intent analysis, as in *Feeney*, in favor of an analysis based on discriminatory impact.

AMBIGUITY OF THE PROPOSED AMENDMENT

The amendment's lack of clarity regarding its practical effect would invite judicial interpretation to determine as precisely as possible what the amendment actually means. The common-sense view of the judiciary would be that if the amendment is ratified, it must mean something other than the equal protection clause of the 14th amendment. Thus, the judiciary would tighten considerably the test of what constitutes a violation of equal rights. The discriminatory impact analysis is undoubtedly a tighter test than discriminatory intent. Logically, it would seem fair to assume that under the ERA the test for proving unconstitutional discrimination against women would be discriminatory impact.

DIVISION OF THE JUDICIARY REGARDING THE QUESTION OF IMPACT VERSUS INTENT

In *Feeney*, the Justices dissenting from the majority were willing to strike down the veterans' preference law because, in their view, when "the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme." If the ERA rather than the 14th amendment were to serve as the constitutional basis for such challenges to alleged sex-based discrimination, it would not be surprising to find the logic of the dissenting judges in *Feeney* more persuasive than that of the majority judges.

Summary of Questions Directed to Mr. Meloy, Mr. Phillips, Professor Shanor, and Professor McDowell

Senator Hatch questioned the panel regarding:

(1) The effect of the ERA on the *Feeney* decision;

(2) Whether the ERA would incorporate an impact standard into the Constitution for review of facially neutral statutes;

(3) The effect of the ERA on veterans' preference if sex were established as a suspect classification;

(4) A possible conflict between veterans' preference laws and affirmative action policies;

(5) Amending the ERA to eliminate impact on veterans' preference laws; and

(6) The effect of the ERA on veterans' preference policies generally.

(1) Effect of Ratification of the ERA on the Feeney Decision

Commenting that leading proponents of the ERA argue that ratification of the ERA would result in the overturning of the decision in *Massachusetts* v. *Feeney*, Senator Hatch asked the panel for its views on this issue. Mr. Meloy agreed that the *Feeney* decision would be overturned, surmising that the Court would apply the same standard (strict scrutiny) in sex cases as in race cases. While absolute preference would be disallowed, he said, he was not sure that the outcome would be the same with respect to a statute like Montana's, which now is very narrowly tailored. Professor McDowell also believed the adoption of the ERA would overturn *Feeney*, given the ambiguity of the amendment, saying that the meaning of the ERA would be determined through litigation and that proponents would argue that impact should supplant intent as the standard of discrimination. Professor Shanor said he did not believe *Feeney* would be overturned, that a better reading of the language and purposes of the ERA would lead to maintaining the intent standard of *Feeney*. Disagreeing with Mr. Meloy's answer, he noted that in *Washington* v. *Davis*, a race case, the Court said that intent rather than impact is the governing standard under the equal protection clause of the 14th amendment, adding that he believed intent would also be the standard of discrimination under the ERA also.

(2) Incorporating an Impact Standard into the Constitution for Review of Facially Neutral Statutes with Predictably Disproportionate Effects

Senator Hatch asked the panel if the ERA would incorporate into the Constitution a view of sex discrimination approximating that of the dissenting Justices in *Feeney*, who said that "when the forseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme." Professor Shanor disagreed that there would be an impact standard under the ERA, and added that he did not agree with the dissenters regarding the level of scrutiny, i.e., strict scrutiny, that would be required once the ERA were applied to a particu-

lar statute. When pressed further by Senator Hatch, he said that should the Court decide to employ an impact standard, then *Feeney* would be overruled.

(3) EFFECT OF THE ERA ON VETERANS' PREFERENCE IF DISPARATE IMPACT IS NOT INCORPORATED INTO REVIEW UNDER THE AMENDMENT, BUT SEX IS ESTABLISHED AS A SUSPECT CLASSIFICATION

In response to Senator Hatch's question, Mr. Meloy saw no reason why the Court would treat sex-based discrimination differently from race-based discrimination as a suspect classification, a treatment he characterized as a "balancing of interests between intent and impact." Professor McDowell believed that if sex were established as a suspect classification, a new standard incorporating discriminatory intent could be fashioned, since veterans' preference programs inevitably benefit men more than women. He did not agree with Mr. Meloy that the Court would abide by the standard developed under the equal protection clause, requiring proof of intent to discriminate, adding that new standards probably would be developed under an ERA that would effectively lead to an overturn of *Feeney*. Professor Shanor reiterated that the ERA does not adopt—and should not be read to adopt—an impact standard, and therefore concluded, with respect to all veterans' programs except those which are not facially neutral, that the courts would not reach the suspect classification question.

Responding to Senator Hatch's further question regarding the possibility of the ERA establishing a more rigorous standard of review for classifying "disadvantaged" women, which might render veterans' perference laws impermissible, Professor Shanor said that he did not believe the courts were any more likely under the ERA than under the equal protection clause to rule that there was an intent to "disadvantage" women under the preference statutes, since there are legitimate beneficial purposes to such statutes.

(4) POSSIBLE CONFLICT BETWEEN VETERANS' PREFERENCE LAWS AND AFFIRMATIVE ACTION POLICIES DESIGNED TO ESTABLISH HIRING PREFERENCES FOR MINORITIES AND WOMEN

Senator Hatch asked whether veterans' preference laws unavoidably conflict with affirmative action policies. Mr. Meloy responded that the Court has been ambivalent about whether so-called "benign discrimination," e.g., discrimination designed to overcome past discrimination, such as affirmative action, is constitutional. Pointing again to the narrowly tailored preference statute devised by the Montana Legislature, he suggested that this kind of *limited* preference statute could be harmonized with an affirmative action program, without jeopardizing the constitutionality of either one. Professor McDowell, agreeing that there need not be tension between the two programs in principle, commented that since 1976 there has been an increase in the number of women and minorities taking advantage of veterans' preference policies regarding initial hiring (in which veterans receive preference over other applicants for civil service jobs), indicating that veterans' preference is not undercutting affirmative action initiatives. To the contrary, Professor Shanor thought that veterans' preference has a definite impact in

limiting opportunities for women. He observed that there is no affirmative action legislation which gives preference (similar to veterans' preference) to women or minorities because of their status as women or minorities, stressing that title VII is not an affirmative action statute but rather a nondiscrimination law and that the authority of the Office of Federal Contract Compliance Programs (OFCCP) has a relatively limited scope. He also said that while veterans' preference has a negative impact on women, it probably has a beneficial effect on minorities, because there tend to be larger numbers of minority males than white males in the Armed Forces. Mr. Phillips' response was the veterans' preference is earned through service to the country, unlike affirmative action which is not service-connected. He also noted that as the number of women veterans increases, the problem with disproportionate impact will lessen.

Concluding the discussion, Senator Hatch expressed concern that elimination of veterans' preference would eliminate employment opportunities for minorities should the ERA result in the overturning of veterans' preference laws.

(5) AMENDING THE ERA TO ELIMINATE IMPACT ON VETERANS' PREFERENCE LAWS

Senator Hatch asked the panel if Congress would be prudent to amend the ERA to state its intention that the amendment should not affect existing veterans' preference statutes. Professor McDowell and Mr. Phillips agreed with this approach, while Professor Shanor said he thought the same result could be accomplished by inserting this intention into the legislative history, adding that he believed that "with constitutional amendments, it is better to keep them relatively clean." When pressed further by Senator Hatch, however, he said he would not oppose amending the amendment.

(6) EFFECT OF THE ERA ON VETERANS' PREFERENCE PROMOTION POLICIES AND OTHER PREFERENCE POLICIES GENERALLY

Noting that preference affects not only initial hiring by Federal and State civil service but, frequently, promotion policies as well, Senator Hatch asked if the constitutional issues in both policies are relatively similar and whether veterans' preference policies regarding promotions would be affected by the ERA. Mr. Meloy commented that, as part of his constitutional challenge of preference in Montana, he was attempting to establish that preference not only causes problems for women with respect to hiring opportunities, but also with respect to promotions. Professors McDowell and Shanor agreed that any kind of preferential treatment in promotion would violate the ERA.

Senator Hatch asked whether preferences provided to the mother or wife of a veteran would help to mitigate the alleged unconstitutionality of the preference under the ERA, and whether such a preference provided solely to the female parent of a veteran would be constitutional under the ERA. Professor Shanor responded that a single-sex classification would be unconstitutional, but that such

statutes could be changed to provide preference for "spouses" and "parents," which would not be unconstitutional.

Senator Hatch then asked the panel to summarize for the Committee the type of veterans' preference programs which would or would not be constitutional under the ERA. Responding, Professor McDowell said that all veterans' preference programs would be unconstitutional, while Professor Shanor believed that if there were veterans' programs that make classifications based on sex, these would be invalidated.

Generalizing from the topic under discussion, Senator Hatch asked if under the ERA any public policy which disadvantages women as a class could be found valid by the courts. Professor Shanor answered that only if there is "compelling governmental interest," a proof required by the strict scrutiny test under the equal protection clause. He added that any veterans' preferences that are expressly based on sex could be stricken even under the equal protection clause intermediate test, which requires that the classification "must serve an important governmental objective" and "must be substantially related to that objective."

Summary of Statement by Donald B. Schwab, Veterans of Foreign Wars of the United States

Mr. Schwab proposed amending the ERA to preclude its application to veterans' preference and cited statistics to disprove the argument that women are disadvantaged in Federal employment because of veterans' preference.

NEED TO AMEND THE AMENDMENT

Since the stated intention of proponents of the Equal Rights Amendment is to challenge the *Feeney* decision and then, having established a precedent, to challenge all other veterans' preference laws, the National Commander-in-Chief of the Veterans of Foreign Wars wrote to the chairman and members of the House Judiciary Committee and then to all Members of the House of Representatives asking that the proposed amendment be amended as follows:

> (1) This article shall not be construed to affect any benefit or preference given by the United States or any State to veterans, and
>
> (2) This article shall not be construed to require the assignment of women to military combat.

When a vote on H.J. Res. 1 was taken in the House on November 15, 1983, the Speaker of the House called up the measure under a suspension of the rules, a procedure which permits no amendments from the floor and which normally is used for noncontroversial legislation.

WOMEN NOT DISADVANTAGED BY VETERANS' PREFERENCE IN FEDERAL JOBS

Women's activist groups claim that women are second-class citizens because their opportunity to acquire veterans' preference has been so circumscribed that they face almost insurmountable obstacles in competing with veterans for Federal employment. Although

women never met their voluntary enlistment quotas during World War II, the Korean conflict, or Vietnam, enough women did serve during these periods, or acquire derivative entitlement as spouses (via the death or disability of a serviceman) to fill nearly all the 893,500 Federal civil service jobs then held by women.

According to data for fiscal 1982, obtained from the Office of Personnel Management, 46 percent of total Federal jobs for 1982 were filled by women, including 8 percent of those hired on the basis of veterans' preference. Presently, women are 39.2 percent of Federal employees and 5.8 percent of women Federal employees enjoy veterans' preference, while 85.3 percent of those entitled to the 10-point veterans' preference (for the disabled) are women. Therefore, the thesis that women are suffering loss of Federal employment because of veterans' preference is without foundation.

SUMMARY OF STATEMENT BY E. PHILLIP RIGGIN, AMERICAN LEGION

Mr. Riggin outlined the history of veterans' preference, including its present provisions, and stated the American Legion's support for the program. He urged that specific language be added to the Equal Rights Amendment to protect veterans from any potential court decision holding veterans' preference or veterans' programs unconstitutional.

HISTORY OF VETERANS' PREFERENCE AND CURRENT PROVISIONS

Limited forms of veterans' preference regarding government jobs have been provided since the beginning of the Nation's history. It was not until World War II that Congress enacted legislation giving veterans priority in Federal employment as a matter of policy. The Civil Service Commission opposed absolute preference for all veterans in all Federal positions as inconsistent with a merit system, although agreeing with veterans' preference in principle, with the result that veterans' preference in Federal employment is not absolute.

At present, State and Federal statutes afford preference to wartime veterans on entry into Federal or State service and protects wartime veterans during reduction-in-force (RIF) actions. Veterans' preference has no effect on promotion or career advancement and does not extend to the Senior Executive Service, to "excepted" positions (such as doctors or lawyers), temporary or seasonal employment or to situations in which a function is abolished (such as when one agency's functions are absorbed by another). Since passage of the Civil Service Reform Act of 1978 (5 U.S.C. 2108), no veteran with 20 or more years of military service, no veteran discharged after October 14, 1976, and no veteran discharged with the rank of major or above is covered by veterans' preference.

Perhaps the strongest statement regarding the legitimacy of veterans' preference was made by the Supreme Court decision in *Feeney*.

NEED FOR AN AMENDMENT TO THE ERA

Because of the predictions of several legal scholars that veterans' preference would be held discriminatory if the ERA were adopted

and because of our belief in veterans' preference, we strongly urge this Committee and the Congress to add specific language to the Equal Rights Amendment shielding veterans from any potential court decision holding veterans' preference or veterans' programs unconstitutional. If under the ERA veterans' preference were found unconstitutionally discriminatory against women, we would have a difficult time reconciling such a finding with the fact that men, primarily, have been called upon in all of our past wars. Any sexual discrimination that results from veterans' preference is a result of this long history of male service in the military.

Summary of Statement by June A. Willenz, American Veterans Committee (AVC)

Ms. Willenz said that the AVC supported the ERA and saw no conflict between the ERA and veterans' preference. Regarding veterans' preference in public employment and the provision of other veterans' benefits, she said the AVC supports sufficient veterans' preference to facilitate veterans readjustment to civilian life with a minimum of economic loss and hardship but not the total, lifetime preference upheld by the decision in *Feeney*. She said the AVC also supports expansion of the number and roles of women in the military as a means of eliminating sex discrimination in all aspects of daily life.

LACK OF CONFLICT BETWEEN THE ERA AND VETERANS' PREFERENCE

The AVC sees no conflict between the ERA and the limited type of veterans' preference we support. The AVC strongly supports the adoption of the ERA, as we believe that sex discrimination ought not to be the basis for laws, regulations, or actions by any government or agency of government.

Even though more males than females become veterans, the benefits' objective is to assist veterans of either sex—the distinction drawn is between veterans and nonveterans, not between males and females. Since the ERA would forbid governments from denying or abridging "equality of rights . . . on account of sex," there would be no conflict between the ERA and a veterans' preference statute that rests on the distinction between veterans and nonveterans.

AVC SUPPORT FOR LIMITED VETERANS' BENEFITS

The basic objectives of veterans' preference are to facilitate the readjustment from military service to civilian life with a minimum of economic loss or hardship, and in case of disability or death in military service, to provide a decent standard of living for the veteran and the veteran's family or survivors. We believe that an "initial appointment" veterans' preference is justified and is part of the obligation this Nation owes its veterans. The AVC does not approve the kind of veterans' preference embodied in the statute challenged in *Feeney*, which provides a total, lifetime, across-the-board preference in public employment for veterans over all nonveterans.

SUPPORT FOR INCREASING NUMBERS AND ROLE OF WOMEN IN THE MILITARY

The AVC has worked diligently to expand the numbers and role of women in military service. Increasing numbers of women are serving in the military and are becoming veterans, entitled equally with male veterans to the benefits of veterans' preference. Support for such increases should be the focus for those who, like AVC, seek to eliminate sex discrimination in all aspects of daily life, rather than to invalidate preference laws, which are directed toward benefitting veterans of either sex.

THE ERA AND THE FEENEY DECISION

The veterans' preference laws, as the Supreme Court stated in *Feeney* (at p. 275), are not based on a distinction "that can plausibly be explained only as a gender-based classification." The Court's opinion, noting that the statute was neutral on its face as to gender, ruled that its principal distinction was between veterans and nonveterans of either sex, and that its purpose was to benefit veterans rather than to discriminate against women.

In the light of the history and purpose of veterans' preference laws, the continually increasing role of women in the military and as veterans, and the different directions in which the veterans' preference laws and the ERA are focussed, we believe that the ERA would not invalidate veterans' preference laws generally or in principle.

SUMMARY OF STATEMENT BY DENNIS K. RHOADES, VIETNAM VETERANS OF AMERICA (VVA)

Mr. Rhoades testified that the VVA strongly supports both veterans' preference and the Equal Rights Amendment, since both address the same principle: parity. However, because of past legal challenges to veterans' preference on the basis of sex discrimination, the VVA urged that Congress assure that veterans' preference rights and benefits are adequately protected by means of an unequivocal expression of congressional intent regarding this principle as part of the legislative history of the amendment.

SUPPORT FOR PARITY PRINCIPLE EMBODIED IN BOTH THE EQUAL RIGHTS AMENDMENT AND VETERANS' PREFERENCE

While it has been suggested that the ERA and veterans' preference are in conflict, VVA believes that the two can exist side by side. Both address the fundamental question of parity. The ERA affords women parity on all levels of the socioeconomic scale. Parity for veterans arises out of the social contract between the Nation and its citizen-soldiers under which the Government has a lifetime commitment to those who were disabled or killed as a result of military service. In addition, the Government has a responsibility to those who served in the military to provide the necessary assistance to achieve parity at all levels of civilian life.

NEED FOR CLARIFYING STATEMENT TO PROTECT VETERANS' PREFERENCE

Despite our view that veterans' preference and the ERA can reasonably coexist, we urge the Congress to assure that veterans' preference, rights, and benefits are adequately protected. We believe that this protection is necessary because of past legal challenges to veterans' preference on the basis of sex discrimination, e.g., the *Feeney* case, and because of the stated positions of certain proponents of the amendment in favor of overturning *Feeney* or of eliminating veterans' preference. Although some of our members have suggested that the ERA should be amended, we believe an expression of congressional intent in the legislative history of the amendment should be more than sufficient.

SUMMARY OF STATEMENT BY DAVID J. PASSAMANEK, AMERICAN VETERANS (AMVETS)

Representing AMVETS, Colonel Passamanek emphasized the organization's belief that veterans' preference in Civil Service hiring and retention is an earned, lifetime right. He said that while AMVETS has taken no formal position on the ERA, it urges that language be included in the amendment specifically excluding from the effects of the amendment all veterans' preference and entitlement programs.

SUPPORT FOR VETERANS' PREFERENCE AS AN EARNED, LIFETIME RIGHT

AMVETS believes that preference in hiring and retention in the Civil Service is a lifetime right for life of war veterans, earned through the unparalleled sacrifices that military service demands. Preference in hiring is one affirmative action program which is based on performance and achievement and not racial or sexual accident of birth.

NEED FOR AN AMENDMENT TO THE ERA SAFEGUARDING VETERANS' PREFERENCES AND BENEFITS

Various interest groups antithetical to national defense and military service have questioned all veterans' programs as violations of the concept of gender equality by applying the radical philosophy of equality of numerical result rather than equality of opportunity.

Although AMVETS take no specific position in ERA—our last convention defeated a resolution opposing it—we urge that clear and specific language be included in the amendment defining equality as "equality of opportunity and not equality of result" (e.g., numerical equality) and specifically excluding all veterans' preference and entitlement programs from coverage of the amendment. Without such language, the courts will assuredly interpret the ERA so as to attack veterans' programs. It is clear that the ERA will be used by many of its most vigorous supporters as another tool against veterans and the national defense establishment in general, not necessarily because of their belief in equality, but because of their deeper hostility to the legitimate security interest of this country and of the noncommunist West.

Summary of Questions Directed to Mr. Schwab, Mr. Riggin, Ms. Willenz, Mr. Rhoades, and Colonel Passamanek

Senator Hatch questioned the panel regarding:

(1) The need to amend the ERA to protect veterans' preference;

(2) The use of "intent" versus "impact" in analyzing discrimination under an ERA;

(3) The definition of "properly tailored" veterans' preference and the question of legislative versus judicial primacy in determining the extent of preference; and

(4) The principal justification for veterans' preference programs.

(1) Amending the ERA to protect veterans' preference

Senator Hatch polled each panelist regarding this issue. Mr. Schwab of the Veterans of Foreign Wars (VFW), Mr. Riggin of the American Legion, and Colonel Passamanek of the American Veterans of World War II (AMVETS) favored amending the amendment to protect veterans' preference. Mr. Rhoades of the Vietnam Veterans of America (VVA) said that the VVA believes there is a misperception that the ERA would encroach upon veterans' preference and that his organization would like the legislative history to clarify that there is no conflict between the ERA and veterans' preference. Following further discussion with Senator Hatch, who pointed to testimony from opponents stating that the ERA would eliminate preference, Mr. Rhoades affirmed that the VVA favors any necessary means to preserve veterans' preference law, including an amendment to the amendment. He repeated, however, that the VVA believed that the legislative history approach ought to be studied and that clarification of the amendment using the legislative history was a reasonable approach.

Ms. Willenz of the American Veterans Committee (AVC), who was joined in responding by the AVC counsel, Frank Weil, said the AVC did not believe there would be a conflict between the ERA and "rehabilitative" veterans' preference, that the intent of veterans' preference [regarding civil service employment] is already spelled out in the statute, that Congress could easily amend other veterans' preference laws that have differential impact on men and women "to make clear that the purpose of veterans' preference laws is rehabilitation and not discrimination." She said that AVC did not favor an amendment to the amendment.

(2) Analyzing discrimination in veterans' preference statutes: the question of intent versus impact

Quoting from Ms. Willenz' testimony, which stated that there was "no conflict between the ERA and a veterans' preference statute that rests on the distinction between veterans and nonveterans and is not intended principally to discriminate in favor of one sex as against the other sex," Senator Hatch then asked Ms. Willenz if the AVC believed that discrimination under the ERA would be analyzed according to the intent or the impact of a challenged statute. Answering for AVC, Mr. Weil said that if there was no intent

to discriminate, but there was disparate impact, the next question would be how might the objectives of veterans' preference legislation be achieved in a nondiscriminatory or significantly less discriminatory manner. If such an alternative existed, then the challenged practices would be illegal under the ERA, he said.

(3) DEFINITION OF "PROPERLY TAILORED" VETERANS' PREFERENCE AND THE QUESTION OF LEGISLATIVE VERSUS JUDICIAL PRIMACY REGARDING THE EXTENT OF PREFERENCE

Senator Hatch then asked Mr. Weil to define a "properly tailored" veterans' preference statute and asked whether the decision regarding such a statute would be made by the courts or the legislature. Mr. Weil responded that, although the courts ultimately would decide the extent of veterans' preferences, he would recommend that [Federal and State] legislatures approved veterans' preference provisions that allow for an initial preference to reintegrate veterans into the civilian workforce for a certain number of years after discharge, with a further provision transferring the preference to a member of the family who is able to work, if the veteran is too disabled. He said such provisions would probably be constitutional under the ERA and that they would achieve the intent of veterans' preference—the reintegration of the veteran into society. He added that such provisions would allow the disabled veteran a preference on account of his disability, not solely on account of his veterans status. He predicted that the courts would uphold a statute.

(4) PRINCIPAL JUSTIFICATIONS FOR VETERANS' PREFERENCE PROGRAMS

In response to Senator Hatch's question, Ms. Willenz repeated that the AVC favors programs to rehabilitate veterans into the community to make up for lost time and opportunities. In response to Senator Hatch's further question regarding rewards to veterans for "a job well done," Mr. Weil said that AVC believes that a person who served in his country in time of war and came out without damage to health has done no more than his duty, adding that every citizen should be ready to do that much and needs no further reward.

Colonel Passamanek said that the major justification for preference programs was the need for initial rehabilitation, but that he believed Congress intended veterans' preference programs to be an earned reward for military service and that preference is a right for life. Mr. Riggin, Mr. Schwab, and Mr. Rhoades viewed veterans' preference in terms of readjustment and compensation.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON SOCIAL SECURITY PROGRAMS

INTRODUCTION

On March 20, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the impact of the Equal Rights Amendment upon Social Security programs.

Jane C. Sherburne, Esq., a Washington, DC, attorney, noted the pervasive impact of the Social Security Program on American society with respect to the number of people who are either beneficiaries or taxpaying contributors to the program. She said that Congress should examine the treatment of women under Social Security and the impetus that the ERA would provide for reform.

Judith B. Finn, economist and author, said that the Social Security Program is sex-neutral since all workers, male and female, receive the same protections with regard to retirement, disability, and survivor's benefits. Despite the neutral intent of the program, she noted that women as a group receive greater return from their tax contributions to the system than do men and that therefore, it could not be argued that the Social Security Program has a negative impact on women. Thus, Social Security should not be affected by the ERA, she said, except that feminists would bring suit under the amendment to force changes. Since no one can predict the outcome of such suits, including the extent or cost of reforms or their possible effect in limiting choice regarding the homemaking role, she concluded that this uncertainty is itself sufficient reason to oppose passage of the proposed amendment.

SUMMARY OF STATEMENT BY JANE C. SHERBURNE, ESQ., WASHINGTON, DC

Ms. Sherburne took note of the pervasive impact of the Social Security Program on American society with respect to the number of people who are either beneficiaries or taxpaying contributors to the program. Thus, she said that it is appropriate that the Congress examine the treatment of women under Social Security and the impetus that the ERA would provide for reform.

PROGRAMMATIC VIEW OF WOMEN BENEFICIARIES UNDER SOCIAL SECURITY

The Social Security Program is predicated on stereotypical notions of the role of women in society (i.e., as homemakers) and of the value of their contributions as homemakers to the family. The program is designed to provide women with benefits as dependents of their husbands on the faulty assumption that, as women, they would never work for pay and never divorce. Thus, the program did not provide to women dependents access to survivor, disability,

and retirement protections in their own right. As originally conceived, the program never anticipated a need to accommodate what is now the typical lifetime patterns among American women: years of unpaid work in the home combined with years of outside paid work. Recent statistics show that 64 percent of married women are now in the workforce and that over 50 percent of all married women with pre-school children are working for pay.

SOCIAL SECURITY PROTECTIONS AFFORDED TO WOMEN

Although women may acquire access to benefits either directly, as insured workers, or derivativeley, as wives of insured workers, neither route to benefits gives women the degree of protection against economic insecurity that the program generally provides to men. The Social Security Administration (SSA) reported in 1982 that the average lifetime wages operates to disadvantage women primarily, since those who are unpaid homemakers for longer than 5 years accumulate "zero-earning" years, which reduce their benefit amounts by reducing the average wages earned in covered employment. Further, intermittent absence from the labor market for child-bearing and child-rearing means that women forgo wage increases and promotion opportunities which would have led to higher benefit amounts. Again, Social Security penalizes women by treating the unpaid contributions of the homemaker (beyond the first 5 years) as a zero contribution.

BENEFITS FOR DIVORCED WOMEN

Divorced women face even greater barriers to economic security. Social Security benefits are available to a divorced woman only if the marriage to an insured worker lasted at least 10 years. Not only do most divorces occur during the first 10 years of marriage, but it is usually during the early years of marriage that many women sacrifice the opportunity to build their own Social Security records by staying out of the paid workforce to raise children. Unlike their husbands, whose protection is unaffected by divorce, these women lose the protection that the system is supposed to provide to unpaid homemakers.

Even when the marriage lasts more than 10 years, the benefit available to the divorced spouse—50 percent of the insured spouse's "primary insurance amount" (PIA), e.g., the same amount as the dependent spouse benefit—is an amount designed to be combined with the benefit amount of an insured worker residing in the same household.

BENEFITS FOR SURVIVORS OF DECEASED WORKERS

Although survivors of deceased workers are entitled to a benefit that is 100 percent of the worker's PIA, 23 percent of aged widows live in poverty—further evidence of the penalty imposed on women whose labor force participation is shorter than that of men. Survivors cannot receive benefits until age 60, even though they may have only limited workforce skills due to long years as homemakers, and cannot earn a living adequate to support themselves and a family.

SOCIAL SECURITY AND THE QUESTION OF NEUTRAL IMPACT

Because the homemaker is so ill-protected by Social Security and placed at such great economic risk by choosing this role, the choice to become a homemaker might be characterized as foolhardy. Social Security should operate as a neutral factor in the family decision that one spouse spend time out of the paid labor force. However, the program as presently structured is not neutral. Rather, it encourages labor force participation of both spouses because the family suffers a penalty when one spouse forgoes wage-earning years.

PROPOSALS FOR REFORM

Policymakers have begun to acknowledge that the Social Security Program is outdated and maladopted to the economic and social realities of American families. The 1979 Advisory Council on Social Security spent more time addressing the issue of the treatment of women under Social Security than on any other issue. The President's Commission on Pension Policy devoted a major portion of its report to exploring reform options. A major share of the work of the Justice Department's Task Force on Sex Discrimination has been devoted to developing reform alternatives. In 1983, President Reagan's bipartisan National Commission on Social Security Reform considered reform of the program's treatment of women to be of high priority on its agenda. In response to the National Commission's report, the Congress included in the Social Security Amendments of 1983 a statutory mandate that the Department of Health and Human Services undertake a study that would guide decision-makers in this complex area. This leaves little doubt that many knowledgeable people believe the current program requires reform and that the difficult task of crafting that reform has begun.

EFFECT OF PASSAGE OF THE ERA

Passage of the Equal Rights Amendment would intensify the serious efforts aleady underway to develop reforms that would improve the treatment of women under Social Security. However, the ERA would not require any particular reform. Consideration could be given to a variety of ways to restructure the program to eliminate its discriminatory effects. Clearly, any reform would have to be undertaken carefully in light of the complexity of the program and the critical role it plays in the lives of its beneficiaries. The ERA would provide a renewed sense of urgency and commitment to the efforts already begun to improve the treatment of women under Social Security.

SUMMARY OF STATEMENT BY JUDITH B. FINN, ECONOMIST AND AUTHOR

Mrs. Finn said that the Social Security Program is sex-neutral since all workers, male and female, receive the same protections with regard to retirement, disability, and survivor's benefits. Despite the neutral intent of the program, she noted that women as a group receive greater return from their tax contributions to the

system than do men and that, therefore, it could not be argued that the Social Security Program has a negative impact on women. Thus, Social Security should not be affected by the ERA, she said, except that feminists would bring suit under the amendment to force changes. Since no one can predict the outcome of such suits, including the extent or cost of reforms or their possible effect in limiting choice regarding the homemaking role, she concluded that this uncertainty is itself sufficient reason to oppose passage of the proposed amendment.

TREATMENT OF WOMEN UNDER SOCIAL SECURITY

Although the charge is frequently made that Social Security discriminates against women, this is contrary to fact, since the program has been made sex-neutral through congressional amendments to the Social Security Act and by Supreme Court decisions. Many of these changes to effect sex-neutrality have benefitted men, not women, such as the amendment in 1972 to make uniform the number of years dropped before the level of retirement benefits is computed. Prior to this adjustment, women, but not men, could drop three extra years to compensate for their more intermittent labor force participation. Women as a group are now worse off as a result of this change.

For better or worse, women are now treated the same as men with regard to insured status under Social Security. Working women have the same protection as comparable men and their benefits are calculated in the same manner. Both men and women in the labor force have disability insurance and survivor benefit protection, and both men and women are eligible for the spousal benefit.

The claims of discrimination and inequity against women under Social Security have elevated these questions above countless other concerns that are of equal importance. The answers cannot be found in more sex-neutrality, since many of the problems experienced by women under Social Security arise because women are treated the same as men, despite differences in their labor force participation.

RELATIONSHIP BETWEEN TAX CONTRIBUTIONS AND BENEFITS FOR MEN AND WOMEN

Feminists argue that the Social Security Program has a disparate impact on women, e.g., that there is a presumption of women's dependency; that women receive lower average benefits than men; and that the most important shortcoming in the program is lack of recognition of the homemaker's economic contribution to the family. One way to evaluate the charge of disparate impact is to measure whether women as a group receive as favorable a return from their Social Security taxes as do men as a group. In fact, women receive a higher return than men because they tend to live longer and retire earlier and thus collect benefits over a longer period. Because their average earnings are lower, women also receive greater advantage from the "weighted-benefit" formula, which is designed to favor persons with lower earnings records.

These two factors outweigh the fact that more secondary or dependent's benefits are paid on the basis of men's earnings records than on women's. If total taxes paid are compared to total benefits received by all women beneficiaries, either on the basis of their own or their husbands' earnings, women pay about 28 percent of Social Security taxes and receive about 54 percent of the benefits.

If the comparison is restricted to women workers, then the cost of paying benefits to women workers and their dependents has been found to be higher than the cost of paying comparable benefits to men workers and their dependents. Indeed, if separate systems were established, women workers would have to pay Social Security taxes that are about nine percent higher than men for comparable benefits.

SOCIAL SECURITY AND THE ERA

The sex-neutrality of the Social Security Program and its lack of disparate impact should mean that the program would not be affected by the proposed amendment. However, if the ERA were ratified, it is almost certain that feminists who believe that the program is discriminatory would bring suit and demand reforms. The fact that women as a group are significantly advantaged by Social Security would seem to refute adequately the allegations of discrimination. The assertion that the current law pays benefits to homemakers as economic dependents is also incorrect, since spousal benefits are payable as a right on the basis of legal status and not on the basis of dependency. In fact, the spousal benefit was added to Social Security in 1939 in recognition of the value of the contribution of homemakers and the belief that woman should have a guaranteed benefit, whether they work inside or outside of the home.

If the ERA were ratified and the Court ruled that the Social Security Program is discriminatory, the required adjustments to the program would be fundamental and expensive. The extensively debated and analyzed concept of earnings sharing is a case in point. Robert Myers, an expert on Social Security who philosophically supports the earnings sharing approach, says that it would not be feasible to revise the program using earnings sharing without causing large losses to some persons and large gains to others or, if no one loses benefits, without causing large increases in the cost of the program. The primary concern of feminists who support the concept of earnings sharing is the relative rate of return from Social Security taxes to the two-income family as compared to the one-income family. Since each family includes both a man and a woman, this concern with rate of return cannot be judged to have a disparate impact on women.

If Social Security is correctly understood as a social insurance program that transfers tax income to those who do not work because of retirement, disablement, or death of a breadwinner, then the rate of return question becomes irrelevant. It could even be said that disparate impact among groups is a characteristic of all government programs that redistribute income. In any case, distribution of benefits within social programs is properly a legislative question and should be decided by the Congress.

FLEXIBILITY OF CHOICE UNDER PRESENT SOCIAL SECURITY PROGRAM

Social Security, as presently constituted, allows women the freedom to choose different roles. By perpetuating the option to choose homemaking as a primary role, it is contrary to that theory of equality which holds that men and women are not equal until the traditional division of labor within the family is abolished. Currently, there is considerable debate regarding the extent to which we should support families in which one spouse chooses homemaking as a primary role. This is a political decision about the kind of society we want to encourage. Such choices may be made within the limits of the Constitution in its present form. This would not be changed by the ERA. At the same time, proponents of fundamental changes in Social Security such as earnings sharing will attempt to use the ERA to achieve their political ends in the courts. Since legislative resolution of such issues is preferable to judicial decisionmaking—and since it is conceivable that the Court might use the ERA to restrict such legislative resolutions—the ERA should be rejected.

SUMMARY OF QUESTIONS DIRECTED TO MS. SHERBURNE AND MRS. FINN

Senator Hatch questioned the panel regarding the way in which public policy on Social Security might be affected if the ERA is ratified. In particular, he asked about distinctions based on sex in the current program; whether Social Security has a discriminatory or disparate impact; reforms that might be required by the ERA, including the economic impact of the "earnings sharing" reform; and how the Amendment would mandate "fairness."

Senator DeConcini questioned the panel regarding the economic effect of earnings sharing and its possible impact on the family.

(1) SEX-NEUTRALITY IN THE CURRENT SOCIAL SECURITY PROGRAM

Senator Hatch began by asking if female workers are treated identically to male workers concerning eligibility for and level of Social Security benefits. Ms. Sherburne said that the program today is facially sex-neutral, that the remaining sex-based distinctions in the law were rectified by the 1983 Social Security Amendments.

Senator Hatch then asked why it is argued that the Social Security Program has a discriminatory impact upon women. Ms. Sherburne said that the program is based on stereotypic notions about women's lifestyles. Noting that Social Security does not attribute any economic value to work that is performed in the home, she said the program is ill-suited to any worker who spends a large portion of his or her time out of the paid workforce and a large portion in the paid workforce, adding that in our society, such workers are predominantly women. Mrs. Finn differed with Ms. Sherburne, commenting that there is no discriminatory or disparate impact in Social Security against women as a group.

(2) DISCRIMINATORY OR DISPARATE IMPACT OF SOCIAL SECURITY

Senator Hatch and Senator DeConcini asked Ms. Sherburne how she would respond to Mrs. Finn's argument that a disproportionate share of Social Security benefits accrues to women. Ms. Sherburne responded that she did not believe Mrs. Finn's analysis was appropriate because Social Security is primarily a tax transfer program—thus a favorable return on taxes is the wrong measure of value. Rather, she viewed Social Security taxes as protection against loss of wages and said it is men as a group, not women, who, with their higher wages and more continuous attachment to the labor force, claim the lion's share of Social Security protection available to workers and their families.

Senator Hatch asked Ms. Sherburne if this differential in protection under Social Security meant that the program has a discriminatory impact on women. Ms. Sherburne agreed with this statement; Mrs. Finn differed, repeating that there is no disparate impact on women as a group.

Senator Hatch then asked Ms. Sherburne if she was arguing that Social Security should be subject to special scrutiny under the ERA. Ms. Sherburne responded that she hoped that the ERA would reach beyond cases of facial discrimination, e.g. discriminatory "intent," to reach cases of discriminatory impact. She encouraged the Committee to develop a legislative history to guide the courts toward an "impact" analysis. Disagreeing with Ms. Sherburne, Mrs. Finn repeated her earlier statement that women as a class are well-served by the current Social Security Program, since it is adaptive to their different roles as homemakers and as workers, adding that the impact of the Social Security system is related to roles, and that it does not disadvantage women on account of their sex.

Noting that retirement benefits are not reduced for female beneficiaries, despite their longer life expectancy, Senator Hatch asked if the provision of equal monetary benefits does not tend to have a discriminatory impact on males. Answering that the basis for computing benefits is the same for both men and women, Ms. Sherburne said she would need to look at the analysis and statistical tables used in the *Manhart* decision [1] in regard to benefits for male and female pension recipients before commenting further and would submit her full response in writing.

(3) POSSIBLE REFORMS OF SOCIAL SECURITY REQUIRED BY THE ERA

Quoting from an article in the *Georgetown University Law Journal* written by Ms. Sherburne, in which she advised that comprehensive restructuring of Social Security is necessary to achieve significant improvement in women's treatment under the program, Senator Hatch asked if the ERA would mandate extensive changes. Ms. Sherburne replied that she hoped the ERA would reach the kinds of disadvantages women suffer under the program.

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[1] See, *Los Angeles Department of Water and Power* v. *Manhart*, (435 U.S. 702 (1978)).

(a) Recognition of homemaking

Senator Hatch asked if the ERA would require crediting of the estimated economic contribution of homemaker services under Social Security, noting that the Civil Rights Commission has said that the ERA would provide a constitutional basis for such recognition. Ms. Sherburne answered that the ERA would not require any particular reform, that reform could be accomplished in any number of ways, and that the only requirement would be fairness. Regarding homemaker's work, she contended that women's work in the home has value and that this value ought to be recognized under Social Security. Emphasizing that Social Security is a major social program designed to take care of people at risk economically, she said that program should be carefully scrutinized if it seems to provide less economic benefit to women than men.

Mrs. Finn said she did not believe the economic value of homemaker services would have to be credited under the ERA.

(b) Combining spousal and insured worker's benefits

Senator Hatch asked if the ERA would mandate that women be allowed to combine spousal and insured worker's benefits. Ms. Sherburne repeated that the ERA would not require any specific reform, adding that in her view, such a reform also would not be appropriate from a public policy perspective.

(c) Reform of the dependent divorced spouse's derivative benefit

Senator Hatch asked if the ERA would require that a dependent divorced spouse be entitled to derivative benefits whether or not the marriage had lasted for the 10-year minimum period now required. Mrs. Finn said that the ERA would not have an impact. Ms. Sherburne said that since the ERA would mandate fairness in the treatment of women, she believed the amendment would require that the 10-year minimum be reexamined to determine whether women should be penalized, e.g., denied access to benefits, because of time spent as homemakers.

(d) Reassessment of the present balance between equity and adequacy in the Social Security program

Noting that the Social Security law is facially gender neutral—all workers are treated identically whether male or female, Senator Hatch asked if the ERA would require Congress to reassess the balance that it created in the Social Security program between equity and adequacy. For example, would it require Congress to reexamine the concept of weighted benefits, which provide disproportionately higher benefits to lower income workers as compared to higher income workers (a formula allowing a more adequate benefit to lower income workers, but one that is less equitable to higher income workers in terms of return on taxes). Mrs. Finn responded that the ERA would not require changing the objectives of social programs because of disparate impact on one sex or the other. Ms. Sherburne said that she believed the balance that is struck between equity and adequacy in the program is a political judgment, that it is not related to stereotypical notions about sex roles, and and that it would not be affected by the ERA.

(e) Overturn of the Supreme Court decision regarding the pension "offset"

Senator Hatch asked the panelists if they were familiar with the March 1984 Supreme Court decision (*Heckler* v. *Mathews* 52 U.S.L.W. 4333 (1984)), in which the Court ruled Constitutional a 5-year pension "offset" provision under Social Security for which women, but not similarly situated men, were eligible. (In 1977, Congress in response to the *Califano* v. *Goldberg* decision (430 U.S. 199), holding that a gender-based dependency requirement only for widowers applying for spousal benefits under Social Security violated the equal protection component of the fifth amendment, amended the Social Security Act to require spousal benefits due to an individual under Social Security to be reduced by the amount of any Federal or State government pension received, but allowed a 5-year "offset" in which women, but not similarly-situated men, might continue to receive both pension amounts.) Noting that this decision disadvantaged male Social Security beneficiaries compared to female beneficiaries, Senator Hatch asked if the decision would have been decided similarly if the ERA had been part of the Constitution.

Mrs. Finn said she believed that, since the purpose of the ERA is to eliminate gender-based distinctions, the provision would be overturned, even though an important government objective, the protection of women's retirement benefits over a 5-year transition period, was being served by the provision in question. She added that this was a good illustration of why she did not want the ERA passed. Ms. Sherburne said that the *Heckler* v. *Mathews* decision illustrates that if reforms in a program such as Social Security are both narrowly drawn and necessary to protect legitimate retirement expectations, then the courts will tolerate a limited period of unfairness, provided an extremely compelling interest can be demonstrated.

(f) Division of Social Security benefits in community property States

Noting that several State court decisions in a few Western community property States have held that Social Security benefits are not divisible community assets, Senator Hatch asked if the ERA would require that such decisions be overturned. Ms. Sherburne reiterated that the ERA would require a look at the fairness of those decisions.

(g) Amending Social Security to reflect neutraility between workers with different work patterns

Senator Hatch asked if the ERA would require Social Security to be amended to reflect neutrality as between those whose participation in the workforce is continuous and those whose pattern is subject to interruption. Ms. Sherburne said that to the extent that the system treats workers with continuous attachment to the workforce more favorably than workers that spend alternating periods of their lives as unpaid workers and then paid workers, the ERA would require that feature of the program be made fair.

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(h) Reduction of benefits currently payable to survivors of short marriages

Senator Hatch asked if the ERA would require that benefits currently payable to survivors of short marriages be reduced. Noting that she was not sure that such survivors were a disadvantaged group, Ms. Sherburne repeated that the ERA would not require any particular reform.

(4) ECONOMIC EFFECTS OF EARNINGS SHARING

Senator DeConcini asked Ms. Sherburne to describe the concept of earnings sharing, as a method of determining coverage and benefit levels under Social Security, and the possible impact of earnings sharing on the family. Ms. Sherburne, who earlier had characterized earnings sharing as the most comprehensive of the possible reforms of Social Security, said that earnings sharing is based on the idea that marriage is an economic partnership and that work in the home has value. Noting that the major impetus for this particular reform had come from homemakers, she said that earnings sharing would not eliminate homemaker benefits, but would give homemakers access to benefits in their own right, based on their nonwage contributions to the family. Under earnings sharing, she explained that the wage income of a married couple would be pooled and each credited with half of the total for Social Security purposes. Ms. Sherburne said that this reform would not only give a homemaker access to retirement benefits, which she has under the present system as a dependent spouse, but also would build eligibility for survivor benefits and disability protection for her and her family. She noted that under earnings sharing both spouses share the benefits and the burdens of a choice the family makes to have one spouse stay home and one spouse work for pay.

Expressing a contrary view, Mrs. Finn said that married women do not need earnings credits in their own names if they have an intact marriage at the time they retire. She added that the economic consequence of earnings sharing with its elimination of the dependent benefit is that the retirement benefit for a married couple would be cut by one third (except to the extent that the cutback is affected by the weighted benefit formula [2]), e.g., a benefit that is now 100 percent of the insured worker's "primary insurance amount" (PIA) plus a spousal benefit equal to 50 percent of the worker's PIA, would be reduced to a benefit equal to 100 percent of the PIA earned by both partners. Second, she said that she did not believe that homemakers would be better off by sharing disability and survivor insurance benefits with their husbands. She said that under earnings sharing, a one-income family in which the working husband became totally disabled or died would receive only his half of the disability or survivor benefit.

(a) Sharing of levels of earning and quarters of coverage

Senator Hatch asked if under earnings sharing the ERA would require division not only of levels of earnings but of quarters of coverage. For example, he asked if this concept of earnings sharing

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[2] See p. 72.

could result in workers eligible for disability benefits suddenly losing such eligibility after a divorce, e.g., when the quarters of coverage would be diminished by "sharing." Ms. Sherburne responded that neither division of levels of earnings or quarters of coverage would be required by the ERA. She added that there are a variety of methods of implementing earnings sharing, including a guarantee that insured status, once gained, could not be lost.

Mrs. Finn commented that to date no one has been able to work out the problems in earnings sharing and that earnings sharing introduces as many inequities as it solves. She said that covering both individuals in a family would dramatically increase the cost of disability and survivior protection.

(b) Determining "fairness" under the Equal Rights Amendment

Referring to Ms. Sherburne's repeated statement that the ERA would not require any particular reform of Social Security, that it would only mandate fairness, Senator Hatch asked who would determine "fairness"—the Congress or the courts. Ms. Sherburne replied that the ERA would be a guiding principle for any reform the Congress designs, and that the task of creating that reform certainly would be with the Congress.

Noting that Congress already has an obligation to be fair, Senator Hatch asked how the ERA would change that obligation. Ms. Sherburne said that although Congress has already begun looking at the question of unfairness in Social Security, the ERA would provide further impetus for reform. Mrs. Finn observed that the ERA is only a symbolic statement and that there is no indication of what impact the ERA would have on Congress. She added that since no evidence exists that Social Security discriminates against women as a group, no constitutional question exists and reforms are essentially a political question.

THE ROLE OF DISCRIMINATORY INTENT AND DISCRIMINATORY IMPACT IN INTERPRETATION OF THE EQUAL RIGHTS AMENDMENT [1]

INTRODUCTION

On April 23, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the role of discriminatory intent and discriminatory impact in interpretation of the Equal Rights Amendment.

Judith W. Wegner, professor of law at the University of North Carolina, spoke on the importance of the issue of intent versus impact and argued that adoption of a discriminatory impact analysis by the court is warranted.

Edward J. Erler of the National Endowment for the Humanities testified that the most important unresolved question regarding the ERA is the standard of constitutional analysis that the ERA would require and said that the amendment could be interpreted to create a standard for sex discrimination more exacting than that used for racial discrimination and, further, could be interpreted to bring about equal results as opposed to equal rights.

SUMMARY OF STATEMENT BY JUDITH W. WEGNER, PROFESSOR, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Professor Wegner's testimony concerned four basic points:

(1) Why the issue intent versus impact in court analysis of sex discrimination is important;

(2) Why the ERA might be interpreted to embody a discriminatory impact analysis [2];

(3) How a discriminatory impact analysis under the ERA might be applied; and

(4) Why adoption of a discriminatory impact analysis is warranted.

(1) WHY THE ISSUE OF DISCRIMINATORY INTENT VERSUS DISCRIMINATORY IMPACT IS IMPORTANT

The question of what type of proof is needed in ascertaining whether or not a challenged statute is discriminatory, e.g., whether the Court would accept the *intent* of lawmakers to discriminate on the basis of sex or whether—in the case of a facially neutral statute—the Court would accept the *impact* of a challenged statute to determine if it had a sex-based discriminatory effect, is important because of its critical bearing on the breadth of application of the

[1] For a discussion of "intent" and "impact" as applied by the courts in sex discrimination cases, see introductory notes.

[2] As opposed to the narrower, discriminatory intent analysis required under the equal protection clause as a prerequisite for application of enhanced judicial scrutiny.

ERA. Under the equal protection clause of the 14th amendment, intentional use of discriminatory, sex-based classifications must be justified by demonstrating that such classifications bear a fair and substantial relationship to important governmental objectives. This standard is often called the "intermediate" standard, because it falls mid-way between the "rational basis" standard applied to most legislative classifications, and the "strict scrutiny" standard in which the government must prove that the classification is necessary because of a "compelling State interest." The Court has said that discriminatory intent, needed to trigger application of the intermediate standard, may be demonstrated by a variety of factors, including disparate impact. Nevertheless, in cases in which facially neutral classifications have resulted in severe adverse impact on women, the Supreme Court has concluded that no disparate impact has been shown because the Court found no intentional sex discrimination and accordingly required no more than a minimal justification under the rational basis test to uphold a challenged statute.[3]

If the ERA is interpreted to require not only an increased level of justification to sustain use of sex-based classifications, but also to mandate the application of some level of enhanced scrutiny to a broader range of cases (including those in which States employ facially neutral classifications and those which involve equally injurious, facially neutral classifications which substantially disadvantages women), it would provide a significantly expanded zone of protection extending beyond that currently provided under the 14th amendment.

(2) WHY THE ERA MIGHT BE INTERPRETED TO EMBODY A DISCRIMINATORY IMPACT ANALYSIS

According to the current legislative history of the proposed amendment, a court asked to determine whether the ERA embodies a discriminatory intent or a discriminatory impact standard would be faced with divided evidence. On the one hand, a narrow discriminatory intent interpretation could be supported by the similarities between the language of the ERA and that of the equal protection clause, and by suggestions in the ERA's legislative history to date that the ERA is intended to ensure that sex-based classifications are precluded to the same extent as are racial classifications under the equal protection clause (thus incorporating the current discriminatory intent standard, which has been applied in racial cases). On the other hand, a court could be expected to interpret the new constitutional language in the light of the ERA's own legislative history, rather than that of the 14th amendment. That history reveals a broad remedial purpose, as well as an expectation that facially neutral classifications having substantially disparate impacts would be subject to enhanced scrutiny. In the light of this divided evidence, it is particularly important that this Committee

[3] See, *Personnel Administrator* v. *Feeney* (442 U.S. 256 (1979)), a decision upholding Massachusetts' use of veterans preference in operation of the State civil service system, and *Geduldig* v. *Aiello* (417 U.S. 484 (1974)), a decision upholding California's policy of excluding pregnancy from coverage of the State disability insurance program.

develop a clear legislative history to guide the courts' interpretation on this point.

(3) APPLICATION OF A DISCRIMINATORY IMPACT ANALYSIS UNDER THE ERA

Assuming that a disparate or discriminatory impact analysis is found to be implicit in the ERA, important questions of interpretation would undoubtedly be presented. Four hypothetical cases may be used to illustrate how this broader standard might be applied. First, in the veterans' preference case *Feeney*, a contrary result would likely be reached under the ERA if that amendment were interpreted to incorporate a discriminatory impact analysis. Under the two-step analysis required to prove discriminatory impact, it would first be necessary to show substantial sex-based discriminatory impact, demonstrated in *Feeney* by the higher proportion of women than men who constitute the class of nonveterans disadvantaged by the Massachusetts preference policy. An assessment of the State's proposed justifications for the preference statute, under the second step of the analysis, would require the Court to decide whether strict scrutiny (e.g., presence of a "compelling" governmental interest) or intermediate scrutiny (e.g., a "substantial relationship to important State ends") should apply to the facially neutral classification at issue. The intermediate standard would have much to commend it, since it would allow the Court to preserve classifications based on important governmental interests where implemented by means narrowly tailored to those ends. On the other hand, it would limit the use of facially neutral classifications which result in significant discrimination that the Court found unnecessary and avoidable. Even under the intermediate standard, the veterans' preference policy at issue in *Feeney* very likely would fall (although several important State interests are served by the veterans' preference plan), since the preference system itself can be attacked as poorly tailored to serve those ends. However, a more limited preference system, carefully geared to fostering reentry into civilian life immediately upon discharge from the service, might survive such a challenge under the intermediate standard.

Second, a challenge might be raised regarding employee height and weight requirements or similar facially-neutral employment criteria which tend to discriminate against women. (Although this area has been addressed in substantial degree under title VII of the Civil Rights Act of 1964, it is important to have this question addressed under the Constitution to insure permanence of protection.) Once again assuming proof of significant disparate impact, the intermediate standard, requiring "substantial relationship to an important governmental interest," closely resembles the requirement under title VII that facially neutral employment criteria which have significant, sex-based impact be justified as substantially related to job performance. The Supreme Court has indicated in *Dothard* v. *Rawlinson* (433 U.S. 331 (1977)), a case involving height and weight restrictions applicable to prison guards, that such restrictions could be sustained if they were carefully tailored to a job-related requirement. Even if a more stringent strict scrutiny standard were applied, a similar result would very likely obtain.

Third, the discriminatory impact of prostitution laws may be called into question. Criminal codes in many States penalize prostitution by both men and women, yet fail to penalize the interdependent conduct of the prostitute's customer or patron. While such statutes appear to be facially sex-neutral, in fact a disproportionately high number of persons arrested for prostitution have been women. Patrons of prostitutes, a group (or class) likely to contain a disproportionately high number of men, are not penalized. At present there is clear precedent for upholding the constitutionality of laws penalizing prostitution by both men and women when minimum scrutiny (e.g., the "rational basis" standard) is applied.[4] However, a court applying the disparate impact analysis under the Equal Rights Amendment is likely to conclude that such a prostitution statute is discriminatory. The court then would have to decide whether the statute is justified under at least the "intermediate" standard. It would be quite likely to find an important State interest in, for example, the health and safety of its citizens. A problem would likely arise, however, as a result of the poor fit between that objective and the means employed under the challenged prostitution statute. Penalizing providers but not patrons is not justified in the interest of deterring prostitution. Despite the traditional deference of the courts to State judgments concerning the appropriate scope of exercises of the police power, prostitution statutes of the sort described are nevertheless more susceptible to challenge under an ERA which embodies a disparate impact analysis. Assuming a successful challenge, however, a court would likely limit itself to declining to extend criminal penalties to the class of male patrons, while striking down a narrow prohibition of prostitution itself.

Fourth and most troublesome, decisions to deny certain types or levels of social services may have a disparate impact on women. For example, California's decision to exclude pregnancy from coverage under its disability program, at issue in *Geduldig* v. *Aiello* (417 U.S. 484 (1974)), had a severe adverse effect on women. Similarly, a reduction in benefits under the Aid to Families with Dependent Children (AFDC) program might be seen to affect women disproportionately in view of the increasing feminization of poverty. A governmental decision to maintain funding levels for old age or disability benefits, for example, in preference to AFDC, might therefore be challenged under an ERA which incorporated a disparate impact standard.

Assuming that a significant disparate impact could be shown, the question again arises as to whether the challenged State action can be justified in situations in which enhanced scurtiny must be applied. Justifications in cases such as these are likely to be found by citing a scarcity of public resources. Perhaps the best guidance as to how a court might evaluate a situation in which the challenged action is justified by the need to allocate scarce resources among competing claimants, all of whom receive at least some benefits, can be drawn from analogous decisions under Federal civil rights law. In such cases the court has generally accepted government justifications for resource allocation decisions adversely affecting

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[4] See *Commissioner* v. *King* (372 N.E. 2d 196 (Mass. 1977)), and *Smith* v. *Keaton* (285 Va. 530, 206 S.E. 2d 203 (1974)).

members of a protected class after some effort to evaluate the availability of less discriminatory alternatives.[5]

These cases suggest that the courts will continue, under disparate impact, to demonstrate sensitivity to legislative decisions regarding allocation of resources.

Thus, if *Geduldig* were to be retried following passage of the ERA, the State disability insurance system might well be upheld again if it could be shown that the system's viability was at stake. In the absence of such evidence, a State's policy of excluding pregnancy benefits from the coverage of an employee insurance program might well be struck down. A court could be expected to note the particularly severe impact such an exclusion has on women, to consider any sex-neutral policies used in determining the scope of coverage, and to weigh heavily State efforts to maintain a balanced program of coverage which best meets the needs of all participants. While a decision to limit the extent of pregnancy-related benefits would likely survive such analysis, an outright refusal to provide any pregnancy-related benefits might not. A decision to limit the level of such benefits would likely survive constitutional challenge if based on sex-neutral judgments concerning the level of need experienced by competing claimants for social benefits.

(4) WHY ADOPTION OF A DISCRIMINATORY IMPACT ANALYSIS IS WARRANTED

Consideration of these hypothetical cases suggests that interpretation of the Equal Rights Amendment to include a discriminatory impact, rather than a discriminatory intent analysis would provide important additional protection against sex-based discrimination without unduly compromising important competing government interests. This added protection would accord greater constitutional protection against sex-based discrimination than is currently afforded other types of discrimination under the equal protection clause of the 14th amendment, but this added protection is warranted in view of the social problems the ERA is designed to correct.

SUMMARY OF STATEMENT BY EDWARD J. ERLER, NATIONAL ENDOWMENT FOR THE HUMANITIES

Professor Erler testified that the most important unresolved question regarding the ERA is the standard of constitutional analysis the ERA would require. He supported his argument with the following points:

(1) That the amendment's proponents believe that a judicial analysis based on discriminatory impact would be required under the ERA;

(2) That, if an impact test is required under the ERA, few—if any—laws having a disproportionate impact would survive constitutional challenge;

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[5] See, for example, *NAACP* v. *Medical Center, Inc.* (657 F.2d 1322 (3d Cir. 1981)), and *Jennings* v. *Alexander* (715 F.2d 1036 (6th Cir. 1983)).

(3) That use of the disproportionate impact analysis would result in a standard for analyzing sex discrimination more exacting than that used for racial discrimination; and

(4) That because exceptions to the "absolutist" language of ERA would be allowed, e.g., exceptions based on "unique physical characteristics" and so-called "benign" gender classifications, the ERA would bring about equal *results* as opposed to equal rights.

(1) REQUIREMENT FOR JUDICIAL ANALYSIS BASED ON DISCRIMINATORY IMPACT

Virtually all supporters of the ERA believe that the amendment will require the courts to test sex classifications by the "strict scrutiny" standard which has been developed by the Supreme Court in 14th amendment cases for racial classifications. In addition, the amendment's supporters claim that the ERA will require a judicial analysis based on disparate impact. Under an impact standard, a law which is neutral on its face and which is not traceable to any discriminatory intent must nevertheless be judged discriminatory because of its discriminatory impact. Government programs cited by Professor Emerson in his 1971 *Yale Law Journal* article [6] that would be required to meet this standard of equality, e.g., reformed to eliminate any aspects which have a disproportionately negative effect on one sex, include public employee pensions, Social Security, and welfare programs. In addition, mental and physical standards for the military would have to be "neutral as between the sexes" to ensure that they "do not operate to disqualify more women than men." [7]

(2) FEW LAWS HAVING A DISPROPORTIONATE IMPACT WILL SURVIVE CONSTITUTIONAL CHALLENGE

If an impact test were required by the ERA, the disproportionate effect of any law adversely affecting women would be *prima facie* evidence of discrimination. Under an impact test, any laws having a disproportionate impact would be regarded the same as those that intentionally classified by sex. Thus, once disproportionate impact had been shown, the law would be tested under the suspect classification, according to proponents of the amendment and few—if any—such laws would survive, even though the adverse impact were not traceable to any intention to discriminate. Laws regarding veterans' preference and prostitution, as well as those providing (or denying) social services and welfare benefits, are but a few examples of facially neutral laws having a disproportionate impact that would be unlikely to survive the more rigorous analysis.

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[6] Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman: "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," Yale Law Journal, vol. 80, Apr. 1971 pp. 871-985.

[7] Ibid. p. 971.

(3) CONSEQUENCE OF USING DISPROPORTIONATE IMPACT ANALYSIS IN DETERMINING SEX DISCRIMINATION

Disparate impact analysis currently is used under title VII of the Civil Rights Act of 1964. A showing that hiring practices, for example, have resulted in disproportionately fewer females being hired creates a *prima facie* case of sex discrimination under title VII. The complaining party must show "by a preponderance of the evidence" that the defendant's actions were discriminatory. The defendant, in turn, may rebut the *prima facie* claim of discrimination by a showing of some legitimate, non-discriminatory reason for the would-be employee's rejection.[8] Although evidence of disproportionate impact is given greater weight under title VII than under the 14th amendment, proponents of the ERA claim that the ERA would require a more rigorous test of sex discrimination than title VII. Simple proportionality based on sex will be the new test of discrimination required by the Equal Rights Amendment. Thus, it is difficult to imagine any State action that results in an adversely disproportionate impact on women would survive under the ERA.

Most ERA supporters agree that the standards for analyzing sex discrimination would be more exacting than those required for race discrimination. Under the 14th amendment, the necessity for tracing an allegedly discriminatory law to a discriminatory intent on the part of the lawmakers would remain, whereas this connection would not be required under the ERA. This would be an anomalous result since women have not sustained the same assaults upon their rights as have certain racial groups. The laws and court decisions that feminists complain about were intended to benefit and protect women, whereas blacks were subjected to a variety of discriminatory laws and hostile court decisions that were designed to perpetuate second-class citizenship for them. While it is hard to imagine any racial classification that could serve a legitimate purpose in constitutional government, there are many sex classifications that do serve such a purpose, such as those based on physical or biological differences.

(4) EFFECT OF EXCEPTIONS TO THE "ABSOLUTE" LANGUAGE OF THE ERA

Even the proponents of the ERA admit that sex and race are not analogous concepts, that, despite the apparently "absolutist" language of the amendment, there will be exceptions stemming from "unique physical characteristics" and from so-called "benign" sex classifications that benefit the class interests of women. From this it should be clear that the debate over the ERA is not a debate about equal rights, but about equal *results*. The requirement of a standard of proportional results, if it were to be embodied in the ERA, would mean that the ERA will be an amendment which, in effect, would "constitutionalize" affirmative action for women. Rather than amending the Constitution, the appropriate place for remedying historic discrimination against women is through legislation, since legislation is flexible and can be repealed when the specific problems are solved. If the ERA becomes part of the Consti-

[8] See, *Texas Department of Community Affairs* v. *Burdine* (450, U.S. 249 (1981)).

tution, affirmative action remedies will become permanent class entitlements and rights will be proportional according to sex.

Summary of Questions Directed to Professors Wegner and Erler

Questions were asked by Senator Thurmond and by Senator Hatch. Senator Thurmond, quoting former Senator Sam Ervin, asked whether the ERA would invalidate laws based on "physiological and functional" differences between the sexes, or alternatively, whether such laws must be made sex-neutral to withstand constitutional challenge. Senator Hatch began his questions by asking the panel to summarize the concepts of intent and impact, as currently applied by the judiciary to sex discrimination cases, and to explain how ratification of the ERA might change such applications. Senator Hatch then asked the panel about:

(1) The role of statistical evidence under the intent and impact tests;

(2) The relationship between the intent and impact analyses and the standard of review;

(3) The burden of proof under the disparate impact analysis;

(4) Disparate impact under the 14th amendment;

(5) The effect of disparate impact on Federal benefit programs;

(6) Applying disparate impact to subclassifications, e.g., housewives; and

(7) The role of the courts in deciding challenges based on disparate impact.

EFFECT OF THE ERA ON EXISTING LAWS BASED ON DIFFERENCES BETWEEN THE SEXES

Senator Thurmond asked the panel to comment on a statement by former Senator Sam Ervin claiming that the ERA would invalidate all existing Federal and State laws that were based on differences between the sexes. Professor Wegner disagreed with the statement, noting that rape laws, for example, have been upheld, despite their focus on protecting women. Senator Thurmond asked if sex-based laws specifically referring to men would need to be amended to apply equally to both men and women to withstand constitutional challenge. As an example of such a provision, he cited title 18 USC, section 3032, which makes it a criminal offense for a men to have carnal knowledge of a female under the age of 16 who is not his wife. Professor Wegner responded that in the *Michael M.* decision [9] the Supreme Court had upheld a statutory rape law that specifically applied to conduct by a male and not to his female coparticipant. Noting that rape laws have a disproportionate impact, Professor Erler said that, if it is true that the disproportionate impact standard will trigger strict scrutiny under the ERA, then such laws would be invalidated. Regarding the *Michael M.* case specifically, he said the Court would be forced to overturn that decision. Professor Wegner then said that if a facially neutral rape law were adopted, e.g., one that applied to both men and

[9] *Michael M.* v. *Superior Court* (450, U.S. 464 (1981)).

women involved in such conduct, that it would be upheld under the ERA. She added that many State rape laws have been expanded to make both men and women equally liable for criminal punishment. Professor Erler replied by repeating that sex-neutrality is not enough in cases where a law has a disparate impact.

SUMMARY OF THE CONCEPTS OF INTENT AND IMPACT, AS APPLIED BY THE COURTS IN SEX DISCRIMINATION CASES

Senator Hatch asked Professors Wegner and Erler to summarize briefly the concepts involved in the intent and disparate impact tests for identifying discrimination. Professor Wegner replied that an intent test requires some demonstration of *purposeful* discrimination—facial discrimination, for example, or an indication that a statute is being interpreted in a discriminatory fashion. In addition, she said, the Supreme Court has recognized that intent to discriminiate can be shown by a variety of factors, including impact, although impact alone has not been accepted as proof of intent to discriminate on the basis of sex. With regard to the impact test, she said adverse impact could be shown by demonstrating that a substantial proportion of women or men were adversely affected under a facially neutral statute. Professor Erler concurred with this explanation, adding that the intent standard requires some showing of intention to discriminate on the part of the lawmaker and that this is currently the standard in effect with respect to the equal protection clause of the 14th amendment. He said that intent does not have to be expressed directly, e.g., "on the face of the law," but can be inferred from the totality of the circumstances, which might include the impact or effect of the law. The effects test, he said, merely assumes that a disproportionate impact is evidence of discrimination, despite the fact that there is no showing of intent or purpose to discriminate.

(1) The role of statistical evidence

Senator Hatch asked about the role of statistical evidence under the impact and intent tests. Professor Erler answered that under the intent test statistical evidence can be used to infer intention to discriminate and that it can be part of what the Court has called "the totality of the circumstances." He said that under the impact test statistical evidence is itself proof of discriminatory purpose. Professor Wegner added two points: first, that even under the impact test, the disparity must be significant, and second, that statistical evidence would effect the disposition of a case only insofar as such evidence created a *prima facie* case that would require justification. She said that statistical disparities might be legitimate in certain circumstances where a challenged statute was closely tailored to an important government purpose and that such disparities would than be justified constitutionally.

(2) The relationship between the question of the intent and impact analyses and the question of the standard of review

Senator Hatch asked the panelists to distinguish between the intent versus impact controversy and the controversy over the appropriate standard of judicial review for sex-based classifications

and to address the extent to which these are related issues. Professor Wegner said that the Supreme Court has indicated that only a demonstration of discriminatory intent will trigger enhanced scrutiny under either the intermediate standard of review in sex discrimination cases or the strict scrutiny standard in racial discrimination cases. She added that the ERA would increase the number of sex discriminiation cases that would be subjected to strict scrutiny. Professor Erler agreed that the ERA would trigger a heightened judicial scrutiny in sex discrimination cases.

(3) Burden of proof under disparate impact

Senator Hatch asked what the burden of proof would be for a defendant under the disparate impact test, e.g., would a defendant have to demonstrate that:

(a) There was no disparate impact;

(b) There were legitimate nondiscriminatory reasons for the actions taken;

(c) There were legitimate reaons for the actions taken and no alternative approaches likely to result in a lesser disparate impact; or

(d) There were compelling reasons for such actions.

Professor Wegner answered that, first, it would be the burden of the plaintiff to show the existence of disparate impact. Assuming such a demonstration could be made, she said the defending government entity would have to show the importance of its interest in the question under challenge, that it had an "important" interest as required under the intermediate standard or a "compelling" interest as required under strict scrutiny. If the standard of review applied was the intermediate test, the government would also be required to show that various alternatives to the challenged policy or statute were considered and that the one chosen had a lesser impact.

Senator Hatch commented that Professors Freedman and Emerson in the 1971 *Yale Law Journal* article [10] said that the defendant would have to overcome the strict scrutiny standard. He asked Professor Wegner if she disagreed. Professsor Wegner said that she agreed that the compelling governmental interest or strict scrutiny standard, as advocated in the *Yale Law Journal* article, should be applied to facially discriminatory or purposeful discrimination. She said that the courts might apply a less rigorous test, such as that under the intermediate standard, in cases of facially neutral classifications which, nevertheless, have a fairly substantial impact.

Senator Hatch commented that if Professor Wegner is correct that discrimination under the ERA will be identified by some sort of disparate impact test, then the ERA will alter the present test for identifying sex discrimination, since the current test under the 14th amendment is the intent test.

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[10] Barabara A. Brown, Thomas I. Emerson, Gail Falk, and Ann Freedman: "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," Yale Law Journal, vol. 80, April 1971, pp. 871-985.

(4) Disparate impact under the 14th amendment

Senator Hatch asked Professor Wegner if she agreed with Professor Barbara Brown, a leading scholar of the proposed Equal Rights Amendment, that the Supreme Court holding in *Washington* v. *Davis* (426 U.S. 229 (1976)) applying the intent test to the 14th amendment "will not be an appropriate standard under the ERA." Professor Wegner agreed, stressing that the ERA is a different amendment with a different legislative history, and concluded that, in the light of that unique history and context, the Court would recognize that there should be an application of the impact standard. Senator Hatch then asked the panel to define for the record how *Washington* v. *Davis* should be interpreted. Professor Wegner replied that with regard to racial discrimination under the equal protection clause, the Court in *Washington* v. *Davis* held that only intentional racial discrimination would trigger the compelling interest test under strict scrutiny. Elaborating on Professor Wegner's statement, Professor Erler said the Court specifically rejected the disproportionate impact test for racial discrimination and ruled that, without some showing of intention to discriminate, the equal protection clause did not protect against such discimination.

Then Senator Hatch asked the panel the following hypothetical question: Assume the ERA were ratified and a municipal police department offered an employment examination such as that offered in *Washington* v. *Davis*. Assume that (as in that case) there was no evidence of purposeful discrimination, but that not only did black applicants fare poorly in the exam, as in *Davis*, but that women fared equally poorly. Is it correct that black applicants would continue to be unable to litigate a 14th amendment claim because of the ruling in *Davis*, but that female applicants could litigate a Equal Rights Amendment claim on the basis of disparate effect? Both Professors Wegner and Erler agreed that Senator Hatch was correct and that the ERA would introduce into the Constitution a more rigorous test for identifying sex discrimination than for identifying race discrimination.

(5) Effect of disparate impact on government benefit programs

Referring to testimony offered in earlier hearings on the possible impact of the ERA, Senator Hatch said that witnesses had argued that the disparate impact analysis would require substantial reforms of the Social Security system, and that a wide variety of other government programs of financial support, such as pension and welfare programs, would have to be reformed to "eliminate any aspects which have a disproportionately negative impact on one sex." He asked the panel if such programs would be subject to the same constitutional analysis as other governmental actions and policies. Professor Wegner said that they would indeed be subject to the same analysis, adding that a series of such cases already has been litigated concerning situations in which there were requirements of dependency to be demonstrated by one sex only, and that such requirements were struck down. She noted that such litigation was an on-going process, even without the ERA. Professor Erler agreed that the process was on-going, but stated that passage of the amendment would radicalize the process to an unbearable

degree. He said that under an impact analysis whatever laws or governmental actions have a disproportionate effect upon one sex would be subject to a heightened level of judicial scrutiny and might be stricken as unconstitutional. Professor Wegner responded to Professor Erler by citing the *Heckler* v. *Mathews* decision (52 U.S.L.W. 4333 (1984)), in which the Supreme Court held that the sex-based classification of a pension offset exception under the Social Security Act was constitutional. She noted that *Heckler* demonstrates that a law that is carefully tailored to achieve an intended result will be sustained.[11]

(6) Applying the disparate impact concept to subclassifications

Senator Hatch asked if the concept of disparate impact might be applied to an entire classification only, e.g., to all men or all women, or if it would be permissible to apply the concept to subgroups of men or women. For example, he noted that a previous witness argued that Social Security had a disparate impact on homemakers, a particular subclass of women. Professor Wegner answered that the question was difficult to answer without a specific context, but that if there is a severe adverse effect on a large proportion of a subgroup, the effects analysis could be triggered by subgroups. Professor Erler answered that it is quite possible that the courts might apply the disparate impact analysis to various subgroups, such as homemakers or poor women. This would mean that laws that did not have a severe disproportionate impact on women as a class could be challenged because of a disproportionate impact on certain subgroups within the class of women.

(7) Role of the courts in resolving challenges based on disparate impact

Posing another hypothetical question, Senator Hatch asked the panel to assume that the ERA was ratified and that the Congress enacted a flat tax proposal the following year[12] which sharply diminished the progressivity of the present (graduated) tax system. He asked the panel to further assume that this action were challenged in court by a group arguing that women as a class earn only 60 cents for every dollar earned by men as a class, and that a reduction in the progressivity of the tax system operates for the relative benefit of the class of male workers and the relative detriment of the class of female workers. He asked the panel whether under the ERA such a challenge would be upheld. Professor Wegner answered that the success of the challenge would depend upon evidence that the overall class was affected.

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[11] In *Heckler*, the Court ruled that the five-year offset exception was "directly and substantially related to the important governmental objective of protecting individuals who planned their retirements in reasonable reliance on the law in effect prior to that decision under which they could receive spousal benefits unreduced by the amount of government pensions to which they were also entitled."

[12] Under a "flat tax" system, income taxes are levied according to a fixed rate, regardless of a taxpayer's income, as opposed to a "graduated" rate in which the tax rate is increased proportionally with income. Some have argued that a flat tax imposes the greater burden on the poor, among whom women tend to be disparately represented.

OTHER EXAMPLES OF POTENTIAL DISPARATE IMPACT CHALLENGES

After gaining Professor Wegner's agreement that such a case probably would go to a full trial, as opposed to summary judgment, Senator Hatch commented that there are thousands of issues similar to this one that could be brought to trial under the ERA and listed as examples the following statutes: veterans benefits, height and weight employment requirements, prostitution laws, rape laws, welfare benefits, Social Security laws, regressive tax laws, comparable worth, occupational licensing, insurance practices, scholastic aptitude and other academic testing, abortion laws, affirmative action policies, protective labor laws, draft registration, military personnel policy, pension programs, health insurance, research, custody laws, illegitimacy laws, seniority systems, and laws governing wills and estates.

Professor Wegner commented that once judicial interpretation began and some decisions were rendered regarding acceptable justification of disparate impact, the number of cases brought would probably decrease.

Senator Hatch asked if the effect of the ERA would be to shift the burden of proof to the Federal Government to justify instances of disparate impact, and if the courts would decide all these issues. Professor Wegner responded that the courts have in many instances displayed their concern for the separation of powers and that even after passage of the ERA they still would be informed in their decisions regarding such fundamental principles. Senator Hatch again expressed his belief that social and economic issues, such as those cited, can be decided better by elected representatives of the people rather than the courts. Agreeing with Senator Hatch, Professor Erler commented that the primary responsibility in constitutional government for making policy belongs with the legislative branch as the most representative branch of government.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT UPON HOMOSEXUAL RIGHTS

INTRODUCTION

On May 23, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the impact of the ERA upon homosexual rights.

Raymond B. Marcin, professor of law at the Catholic University of America discussed the issue of same-sex marriage, arguing that recent Supreme Court decisions about marriage and sex discrimination suggest the amendment might invite mandatory recognition of same-sex marriage.

Eugene W. Hickok, Jr., assistant professor of political science at Dickinson College and codirector of the Center for the Study of the Constitution, argued that the amendment would probably call into question all laws aimed at constraining or punishing homosexual conduct.

SUMMARY OF STATEMENT BY RAYMOND B. MARCIN, PROFESSOR OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA

Mr. Marcin, whose remarks focused on the issue of same-sex marriage, cautioned against interpreting the ERA literally, because a literal interpretation produces a contradiction. He also advised against interpreting the legislative intent of the amendment in order to predict its effect on homosexual rights, stating that recent Supreme Court decisions furnish the best guide to the ERA's probable impact. These decisions suggest that the amendment could invite mandatory recognition of same-sex marriage.

ARGUMENT AGAINST A LITERAL UNDERSTANDING OF THE ERA

To ask whether the ERA, literally interpreted, mandates that same-sex marriage be permitted is to ask the wrong question; it begets a contradictory answer.

The language of the ERA suggests that a man who wishes to marry another man, or a woman who wishes to marry another woman, but who cannot do so because of a statute prohibiting same-sex marriage, is indeed deprived of equal rights on account of his or her sex. Under this literal interpretation, *Loving* v. *Virginia* (388 U.S. 1 (1967)) might serve as a precedent. In *Loving*, the Supreme Court held that Virginia's law prohibiting interracial marriage deprived a black woman and a white man of equal rights because of race. It might be argued, simplistically, that if the ERA were ratified, the Supreme Court would rule against denying marriage to persons of the same sex, as it ruled in *Loving* against denying marriage to persons of different races.

However, a literal interpretation of the ERA also, for consistency, requires a literal interpretation of the word "marriage." Marriage is the legal union of a man and a woman. It is, by definition, a heterosexual institution. On this basis, the State of Washington Appeals Court ruled in *Singer* v. *Hara* (11 Wash. App. 247, 522 P. 2d 1187 (1974)) that a State statute banning same-sex marriage did not violate the State's ERA. The Appeals Court held that marriage was not denied to homosexuals because of their sex; rather, marriage was denied because of its "recognized definition" as an exclusively heterosexual relationship.

Therefore, literal interpretations of the ERA and of marriage lead to a quandary. It is uncertain whether the definition of marriage should influence the meaning of the ERA, or vice versa. The literal approach yields "no answer to the wrong question."

ARGUMENT AGAINST INTERPRETING LEGISLATIVE INTENT

Legislative intent, as interpreted from the legislative history of the ERA, would not necessarily be a good predictor of the amendment's effect on same-sex marriage. Legislative intent does not always indicate the correct meaning of a constitutional provision, because the meaning evolves with successive Supreme Court decisions.

SUPREME COURT DECISIONS PERTINENT TO THE ERA

The implications of the ERA for same-sex marriage can be ascertained best by placing the amendment in the context of relevant Supreme Court decisions about marriage and sex discrimination. Taken together, these decisions furnish a guide to the policies that the framers of the ERA did not foreclose and that the ERA might invite.

The following opinions illustrate how the Supreme Court's view of marriage has evolved over the past century. *Reynolds* v. *United States* (98 U.S. 145 (1878)), denied a claimed constitutional right to practice polygamy in accordance with religious beliefs and so upheld the traditional definition of marriage as the legal union of one man and one woman. *Griswold* v. *Connecticut* (381 U.S. 479 (1965)), in which the Court's understanding of marriage again seemed to be traditional, upheld a married couple's right to privacy regarding contraception. This right, which has been grounded in the marital relationship, was extended to unmarried persons by *Eisenstadt* v. *Baird* (405 U.S. 438 (1972)), an opinion that shifted emphasis from the rights of the married couple to those of the individual. *Zablocki* v. *Redhail* (434 U.S. 374 (1978)), and *Planned Parenthood of Missouri* v. *Danforth* (428 U.S. 52 (1976)), elaborated the individualistic understanding of marriage. *Zablocki* upheld the individual's right to marry, and *Planned Parenthood of Missouri* prohibited States from granting husbands equal influence in abortion decisions. Thus, the earlier view that marriage is a status or covenant basic to human survival has given way to an understanding that marriage is a contract right possessed by individuals.

Other Supreme Court decisions that are relevant in considering the ERA and same-sex marriage pertain to sex discrimination, and many of the Court's contemporary opinions on this issue are a re-

action against traditional ways of thinking about the sexes. In *Singer* v. *Hara*, the State of Washington Appeals Court seemed to find that the slogan "equal pay for equal work" exemplified the primary purpose of Washington's ERA. However, contemporary U.S. Supreme Court opinions about sex discrimination suggest that the Federal ERA would go far beyond requiring equal pay for equal work.

Given recent social and constitutional understandings of marriage and sex discrimination, the ERA would invite the new, individualistic conceptualization of marriage, marital rights, and the right to marry. Moreover, the ERA would invite not only a reexamination but also a rejection of old generalizations about sex, sex roles, and the rights associated with sex. The framers of the ERA thus did not foreclose a policy that would mandate recognition of same-sex marriage.

SUMMARY OF STATEMENT BY EUGENE W. HICKOK, JR., ASSISTANT PROFESSOR OF POLITICAL SCIENCE, DICKINSON COLLEGE, AND CODIRECTOR, CENTER FOR THE STUDY OF THE CONSTITUTION

Mr. Hickok stated that ERA probably would call into question all laws that constrain or punish homosexual conduct, including laws against same-sex marriage. This result would be especially likely if the amendment received a literal, or "absolutist," interpretation by the courts, but also could occur under a less-than-literal, or "commonsense," interpretation. Same-sex marriage was Mr. Hickok's central topic, but, in his opinion, it is only one of many homosexual rights issues raised by the ERA.

AMBIGUITY CONCERNING THE ERA

How the ERA might affect homosexual rights can be only suggested, because of continuing disagreement about the meaning of the amendment. This analysis assumes that the ERA should be interpreted exactly as written. A less-than-literal understanding of the amendment makes the necessity for it doubtful and raises the objectionable possibility that, through judicial interpretations of the ERA, the courts might play an ever greater role in formulating public policy. Literally interpreted, the ERA would establish a constitutional standard of absolute equality between the sexes in all legal relationships. Under such a standard, the courts would judge sex-based laws with the same rigor as they currently judge race-based laws. Since sex, like race, would be impermissible in determining the legal rights of individuals, a law could be challenged if it prohibited a relationship between two men or two women that is legal between a man and a woman. Statutes banning same-sex marriage, which the courts so far have consistently upheld, are a case in point.

THREE QUESTIONS IN THE DISPUTE ABOUT PROHIBITING SAME-SEX MARRIAGE

First, is homosexuality a "suspect" classification, entitling homosexuals those protections afforded racial minorities by the 14th amendment? Homosexuality does seem to merit serious consider-

ation as a suspect classification under the 14th amendment, because homosexuals as a group have been stereotyped and discriminated against, due to a condition that may be involuntary. Since the Supreme Court has never explicated its grounds for declaring certain classifications inherently suspect, the Court, under existing law, could reasonably find discrimination against homosexuals to be less burdensome than that affecting other groups. Under the ERA, however, homosexuality automatically would be a suspect classification. The ERA would prohibit sex discrimination to the same degree that the 14th amendment now prohibits racial discrimination.

Second, is marriage important to homosexuals as a class; that is, do they have a right to same-sex marriage? Sanctioning of the marital relationship confers various legal, social, and psychic benefits that would seem as important to homosexuals as to heterosexuals. Although the courts have never ruled that marriage, by itself, is a sufficiently fundamental right to warrant the use of a "strict scrutiny standard," traditional jurisprudence in this area may be undergoing revision. In the past, the courts have defined marriage almost exclusively as the union of a man and a woman, which uniquely involves procreation and childrearing within a family. But more recently, the courts have considered marriage to be a basic civil right. In *Loving* v. *Virginia* (388 U.S. 1 (1967)), for example, the Supreme Court recognized marriage as a personal right "essential to the orderly pursuit of happiness." In *Griswold* v. *Connecticut* (381 U.S. 479 (1965)), the Court related marriage to the individual's "right to association," protected by the 14th amendment. Given contemporary judicial and societal attitudes, it is unlikely that the constitutional protections surrounding marriage would be made dependent on the bearing and rearing of children.

Third, does government have a compelling interest in prohibiting same-sex marriage; in other words, what is the rationale for this prohibition? Perhaps the most important argument against legalizing same-sex marriage is that marriage is, by definition, the union of a man and a woman. However, definitions are not immutable. Before adoption of the 14th amendment, voters were, "by definition," white male property owners. The purpose of the 14th amendment is to prevent "the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions." [1]

An additional argument is that legalizing same-sex marriage would contradict existing laws against homosexual acts. Because such laws are rarely enforced, the seriousness with which government pursues its interest in enforcement and in preventing same-sex marriage is questionable. Furthermore, it is doubtful, even without the ERA, that statutes prohibiting homosexual acts are constitutional. Since *Griswold* v. *Connecticut*, (381 U.S. 479), the courts generally have held that applying anti-sodomy statutes to private consensual acts by married couples violates the constitutional right to privacy. Indeed, a Federal district court in Texas

[1] Perkins, Samuel T., and Arthur J. Silverstein: "The Legality of Homosexual Marriage," Yale Law Journal, vol. 82, January 1973, p. 582.

ruled in 1982 that the right to privacy protects private homosexual relations between consenting adults.

A LITERAL INTERPRETATION OF THE ERA

The ERA would seem to present a strong challenge to existing laws that limit homosexual conduct, such as marriage. A statute or administrative policy permitting a man to marry a woman, but not another man, clearly involves a classification by sex and would be unconstitutional under an absolutist interpretation of the ERA.

The analogous case is *Loving* v. *Virginia* (388 U.S. 1), in which the Supreme Court ruled that Virginia's anti-miscegenation statutes violated the 14th amendment. According to the Court, "freedom to marry a person of another race resides with the individual and cannot be infringed by the state." If the ERA were ratified, "the same sex" could be substituted for "another race" in this opinion, because the ERA would make sex a suspect classification, just as racial classifications are suspect under the 14th amendment.

The legislative history of the ERA supports the contention that the amendment would preclude distinctions based on sex. In fact, the Senate did not adopt an amendment to the ERA that would have made it inapplicable to laws prohibiting homosexual relations or same-sex marriage.

A COMMONSENSE UNDERSTANDING OF THE ERA

Opponents of the absolutist interpertation might cite *Singer* v. *Hara* (11 Wash. App. 247, 522 P. 2d 1187 (1974)), in which the State of Washington Appeals Court found that a State law banning same-sex marriage did not conflict with Washington's ERA (a measure virtually identical to the Federal ERA). To argue otherwise, ruled the appeals court, would be to subvert the ERA by expanding its scope beyond what was intended by the majority who voted for it. As the court pointed out, Washington's refusal to grant marriage licenses to same-sex couples is based, not on sex, but on a commonsense recognition that society views marriage as the appropriate setting for procreation and childrearing.

There are several weak points in this decision, among them the appeals court's understanding of marriage. As stated earlier, society and the judiciary have moved dramatically away from the concern with procreation and childrearing that is evident in the *Singer* opinion. Perhaps more importantly, *Singer* illustrates the major problem with a "commonsense" interpretation of the ERA: how could the appeals court have known what the voters of Washington had in mind when they ratified the State's ERA?

Some persons contend that a "commonsense" (less-than-literal) judicial interpretation of the ERA would generate a series of exceptions to the amendment. A serious objection to this approach is that Federal judges, rather than elected State and Federal officials, would write the exceptions, possibly making the judges even more active propagators of public policy than they are now.

Moreover, even under a commonsense interpretation, the ERA probably would call into question laws that limit or punish homosexual conduct. Judicial decisions since *Griswold* v. *Connecticut*

(381 U.S. 479) demonstrate a perceptible legal and social trend toward recognizing homosexuality as a legitimate alternative way of life. For example, homosexuality is no longer automatically a sufficient ground for dismissing an individual from employment or for denying a parent the custody of his or her child. It seems that the ERA would accelerate this trend as greater numbers of interested citizens approached the courts for answers to the kinds of questions raised in the present analysis.

Summary of Questions Directed to Mr. Marcin and Mr. Hickok

The inquiry focused primarily on whether the ERA would result in the legalization of same-sex marriage and secondarily on the possible expansion of other homosexual rights under the ERA. Recurring throughout the questions and responses was concern that ambiguity in the amendment might give Federal judges undue freedom to interpret it. The specific topics addressed were:

(1) Legislative versus judicial responsibility for interpreting the ERA;

(2) The standard of review that the courts would apply under the amendment in cases alleging discrimination against homosexuals;

(3) Possible exceptions to what some theorists have described as the principle of absolute equality inherent in the ERA;

(4) The potential for granting homosexual partners various legal benefits now limited to married persons;

(5) The possibility of amending the ERA to preclude legal recognition of same-sex marriage;

(6) The potential for legalizing consensual sodomy;

(7) Other rights that homosexuals might be granted under the ERA; and

(8) The overall impact of the amendment.

(1) LEGISLATIVE VERSUS JUDICIAL RESPONSIBILITY FOR INTERPRETING THE ERA

Senator Hatch asked which of two possible consequences of the ERA would be more likely: Would enhancement of homosexual rights flow logically from the text, or is the amendment sufficiently unclear that Federal court judges might read various homosexual rights into it? Mr. Hickok answered that the text of the ERA (interpreted literally) would lead logically to challenges against legal restrictions on homosexual conduct, but that these could also occur under a "commonsense" (less-than-literal) interpretation. If those who framed the ERA had considered the issue of homosexual rights, the amendment might have been worded differently. Mr. Marcin commented that if lower Federal court judges freely interpreted the general wording of the ERA, the Supreme Court ultimately would define the meaning of the amendment. Initially, however, Congress and the framers of the ERA should clarify its meaning with respect to homosexual rights.

Senator Hatch expressed his opinion that, by passing the ERA, Congress would abdicate a tremendous responsibility and transfer it to unelected judges, who are not subject to the same constraints as is the legislative branch. Congress has previously shown great

skill in shifting responsibility for its legislation onto the Federal bureaucracy.

A major problem with the ERA, stated Mr. Hickok, is the mistaken belief that its interpretation should be left to the courts. The Supreme Court is not the sole arbiter of constitutional questions; both Congress and the President are obligated to understand what the Constitution mandates and what an amendment like the ERA means.

Senator Hatch commented that, according to ERA proponents themselves, the amendment ought to be understood literally. He then asked Mr. Marcin to explain his testimony that a "literalist" interpretation of the ERA might not be entirely appropriate. Mr. Marcin replied that constitutional provisions are very rarely interpreted literally; rather, constitutional meaning evolves over time.

(2) STANDARD OF REVIEW

Senator Hatch asked Mr. Hickok whether same-sex marriage had ever received legal recognition, and Mr. Hickok answered that, as far as he knew, the courts consistently had not recognized it.

Referring to a *Yale Law Journal* article [2] cited in the testimony of Mr. Marcin and Mr. Hickok, Senator Hatch asked if the following syllogism (which assumed ratification of the ERA) accurately represented the authors' meaning: individual A, a male, can legally marry individual B, a female, but not individual C, another male; hence, individual C is being discriminated against, in violation of the ERA. Mr. Marcin and Mr. Hickok agreed with this interpretation. They questioned the counterargument that, under the ERA, a statute prohibiting same-sex marriage would not be discriminatory, because it would apply equally to both sexes. Mr. Marcin added that the authors of the *Yale Law Journal* article correctly viewed the locus of rights as being in the individual, rather than the group or the status of marriage. This is the position taken in recent Supreme Court decisions. Mr. Marcin concurred with the following summary of his opinion by Senator Hatch: our legal system increasingly views the marital relationship as an economic contract and so, under the ERA, would be receptive to the argument that laws against same-sex marriage constitute sex-based discrimination.

According to Senator Hatch, the authors of the *Yale Law Journal* are not alone in their judgment that the ERA might lead to the legalization of same-sex marriage. Among the many other distinguished constitutional scholars who have expressed the same opinion are James White, professor of constitutional law at the University of Michigan; Paul Freund, professor of constitutional law at Harvard University; Rita Hauser, a former U.S. representative to the International Human Rights Commission; Barbra Babcock, professor of law at Stanford University; Paul Kurtz, professor of law at the University of Georgia; and Grover Rees, a professor at the University of Texas Law School.

Senator Hatch further stated that, in the almost unanimous opinion of ERA advocates, the ERA would equate the judicial treat-

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[2] Perkins and Silverstein: "The Legality of Homosexual Marriage," p. 573-589.

ment of classifications based on race and sex. He then asked why it would be incorrect to assume that the Supreme Court's decision in *Loving v. Virginia* (388 U.S. 1) (which declared unconstitutional statutes against interracial marriage) would not control the meaning of the ERA.

Mr. Hickok gave the following rationale for the assumption posed by Senator Hatch (that the *Loving* decision would not control the meaning of the ERA): *Loving* concerns the disparate treatment of individuals according to their membership in different racial groups, but statutes banning same-sex marriage apply equally to the individual members of both sexual groups; thus, under the ERA, such statutes would not be found discriminatory on the basis of sex. The flaw in this assumption, continued Mr. Hickok, is that the Constitution does not protect the rights of groups; it protects only individual rights. For this reason, *Loving* is a significant opinion in the present context.

Mr. Marcin countered that if the ERA were ratified, *Loving* would not serve as an automatic precedent for overturning laws against same-sex marriage. It would not be particularly easy to overturn these laws simply by changing the category of discrimination in the *Loving* decision. Mr. Marcin agreed with Mr. Hickok that constitutional rights inhere only in the individual; nevertheless, those who would argue that *Loving* is inapplicable to laws banning same-sex marriage would maintain that in a sense there are group constitutional rights and restrictions. For example, so-called "racial preference schemes," an attempted remedy for past discrimination, do seem to be a recognition of racial groups' rights under the Constitution.

Senator Hatch next suggested that title VII of the Civil Rights Act of 1964 might guide the interpretation of homosexual rights under the ERA. He cited the example of *Ulane* v. *Eastern Airlines* 581 F. Supp. 821 (N.D. Ill. 1983), in which a Federal district court construed title VII's ban on sex discrimination as prohibiting discrimination on the basis of sex-change operations. (The U.S. Court of Appeals for the Seventh Circuit reversed this decision on August 29, 1984. 742 F.2d 1081.)

According to Mr. Marcin, the relevance of *Ulane* might be limited, because the Supreme Court might give less weight to this case than to determinations by the Equal Employment Opportunity Commission (EEOC), the Federal agency responsible for applying certain parts of the 14th amendment. However, *Ulane* involves a situation analogous to discrimination based on sexual preference. (Some persons would argue that statutes prohibiting same-sex marriage discriminate on the basis of sexual *preference*, not on the basis of sex *per se*.) In *Ulane*, the court ruled that an individual cannot be discriminated against for adopting a new sexual identity. If, under the protection given to sex by the 14th amendment, the EEOC and U.S. district courts rule against discrimination based on adopted sexual identity, then surely the ERA (which would give greater protection to sex than now exists under the 14th amendment) would prohibit discrimination based on sexual preference.

Senator Hatch asked Mr. Hickok to elaborate on the suggestion made in his testimony that homosexuality could represent a "suspect" classification if the ERA were ratified. Mr. Hickok replied

that homosexuality would not automatically be a suspect classification under the ERA; however, it might be, insofar as the ERA would make sex a suspect classification.

(3) POSSIBLE EXCEPTIONS TO THE PRINCIPLE OF ABSOLUTE EQUALITY INHERENT IN THE ERA

Senator Hatch asked whether the right to privacy would be a significant barrier to same-sex marriage if the ERA were ratified. Mr. Marcin replied that, on the contrary, this right probably would favor the legal recognition of same-sex marriage under the ERA. Whereas unisex restrooms might be considered an infringement on the right to privacy, persons of the same sex who wished to marry would not be intruding on anyone else's privacy or marital relationship. He reiterated that the locus of rights is in the individual. Mr. Hickok agreed that under the ERA the right to privacy would support the general movement toward recognizing same-sex marriage. Such recognition would seem especially likely in view of judicial decisions since *Griswold* v. *Connecticut* (381 U.S. 479), pertaining to sexual relations between consenting adults.

Senator Hatch next inquired if the "unique physical charactristics exception" [3] to the ERA might preclude same-sex marriage. Mr. Hickok answered that because the legal and social trend is away from linking marriage with procreation and childrearing, and toward a redefinition of marriage, the unique physical characteristics exception might not impede same-sex marriage. Mr. Marcin noted that even if the traditional definition of marriage did influence the meaning of the ERA, the State still would recognize the right to marry as being independent of procreation. The physical characteristics issue seems to concern just the ability to procreate, not any other aspect of marriage.

According to Senator Hatch, the physical characteristics exception could bar same-sex marriage only on the premise that reproduction is the sole purpose of marriage; and if this were the case, society might just as logically prohibit marriage between individuals beyond reproductive age or otherwise unable or unequipped to have children.

(4) POTENTIAL FOR GRANTING HOMOSEXUAL PARTNERS VARIOUS LEGAL BENEFITS

Senator Hatch, if the ERA were ratified, asked whether there might be a transitional period, rather than the immediate legalization of same-sex marriage: might the judiciary gradually extend to homosexual partners the legal benefits (survivor, insurance, property benefits, etc.) to which only married persons currently are entitled? Senator Hatch cited as an example an ordinance by the San Francisco Board of Supervisors that would have made any qualified

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[3] The 1972 report of the Senate Committee on the Judiciary on the ERA states that the amendment would prohibit discrimination on the basis of sex, with one important exception: The ERA would not prohibit reasonable classifications based on characteristics unique to one sex. (U.S. Congress, Senate Committee on the Judiciary: "Equal Rights for Men and Women", Senate Report No. 92-689, 92d Cong., 2d Sess. Washington, DC, U.S. Govt. Printing Off., 1972.) The argument has been advanced that marriage is an institution based on "unique physical characteristics," i.e., that marriage is, by definition, the union of a man and a woman.

homosexual couple eligible for public employee insurance benefits after payment of a fee legally establishing a quasi-marital relationship. (The ordinance, passed on November 22, 1982, was vetoed by Mayor Dianne Feinstein on December 9, 1982.) Mr. Marcin answered that the courts could easily adopt a pattern of recognizing the rights concomitant with marriage (for example, inheritance rights and the right to support if separation occurs), without fully recognizing certain relationships as marital ones. Heterosexual cohabitation cases illustrate this tendency. Mr. Hickok agreed with Mr. Marcin, not only because of the ordinance by the San Francisco Board of Supervisors, but also because court decisions on homosexual activity have become more liberal since *Griswold* v. *Connecticut* (381 U.S. 479). Mr. Hickok predicted greater judicial liberalization with respect to homosexuality, especially under the ERA.

(5) POSSIBILITY OF AMENDING THE ERA

Senator Hatch, assuming that a majority of Congress would not want legal recognition given to same-sex marriage if the ERA were ratified, asked how the language of the amendment might be changed to preclude such recognition. Mr. Hickok and Mr. Marcin agreed that the change in language would have to be very explicit. Mr. Hickok added that the ERA might not automatically make same-sex marriage constitutional, but probably would have this effect unless specifically amended to be inapplicable to same-sex marriage. Mr. Marcin pointed out that, in general, constitutional provisions should be broadly worded; however, specificity should be permitted when there is sufficient reason for it. Senator Hatch emphasized the necessity for establishing a clear legislative history of the ERA, in order to clarify, among other matters, whether same-sex marriage should or should not receive legal sanction under the amendment.

(6) POTENTIAL FOR LEGALIZING CONSENSUAL SODOMY

Senator Hatch cited the case of *People* v. *Onofre* (72 A.D. 2d 268, 424 N.Y.S. 2d 566 (1980)), in which one of the appellate divisions in New York State ruled that private consensual adult sodomy could not be deemed illegal, and inquired if Federal or other State courts might reach similar decisions under the ERA. On the one hand, Mr. Hickok expressed his opinion that the courts would reach such decisions. On the other hand, Mr. Marcin said that, under the ERA, the U.S. Supreme court would have to treat anti-sodomy laws as it treats laws against fornication, which have not been declared unconstitutional.

(7) OTHER RIGHTS THAT HOMOSEXUALS MIGHT BE GRANTED UNDER THE ERA

Mr. Marcin and Mr. Hickok agreed with Senator Hatch's assessment that the ERA would give homosexuals equal rights "across the board." Mr. Hickok commented that the ERA would accelerate the current legal trend toward overturning or at least challenging constraints on homosexual behavior. Mr. Marcin stated that the ERA would guarantee homosexual rights in such areas as the

workplace, State colleges and universities, and public schools. Homosexual adults would have the right to teach and counsel students; homosexual students would be protected from discrimination.

Senator Hatch mentioned the concern of some persons that homosexuals with access to top-secret information may be national security risks because they may be subject to intimidation, blackmail, and other social pressures. He asked how the ERA would affect the rights of homosexuals in occupations involving national security. Mr. Hickok replied that under the ERA, the Federal Government would have to demonstrate a very compelling reason for denying any homosexual access to top-secret information. Mr. Marcin concurred, adding that such denial would be especially open to challenge if the Supreme Court interpreted the ERA literally, or absolutely. Under an "absolutist" interpretation, the existence of a national emergency would not justify automatically depriving homosexuals of their constitutional rights. Under a more flexible Court interpretation of the ERA, the Government could discriminate on account of sex if it had a compelling reason to do so; however, the definition of "compelling" in the Court's equal protection cases has proven difficult to meet.

(8) OVERALL IMPACT OF THE ERA

Senator Hatch illustrated the possible social effect of the ERA with two quotations. First, according to Anita Miller, former chairperson of the California Commission on the Status of Women, the ERA "is the single most significant event of this century and will bring about a dimension of change greater than ever before." Second, *Impact ERA*, an analysis of the amendment published by female legal scholars, concluded that the purpose of the ERA is to "transform the social order" and "to establish a new and radically different period of human relations." Senator Hatch asked Mr. Marcin whether he agreed that Ms. Miller viewed the ERA as much more than a means to achieve equal pay for equal work, and whether the conclusion of *Impact ERA* was consistent with his testimony that the ERA would challenge traditional ways of thinking about the sexes. Mr. Marcin answered both of these questions affirmatively, reiterating that the ERA would extend far beyond the equal pay issue.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT ON FAMILY LAW

INTRODUCTION

On June 22, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses on the impact of the proposed Equal Rights Amendment to the U.S. Constitution on family law.

Ms. Marsha Levick, legal director of the NOW Legal Defense and Education Fund, spoke in favor of the amendment as a means of eliminating sex-based distinctions in family law and providing a constitutional foundation for equitable principles in the area of domestic relations.

Prof. Lynn D. Wardle, a professor of law at the J. Reuben Clark Law School, Brigham Young University, testified as to what he sees as the generally detrimental effect the Equal Rights Amendment would have upon traditional family relations and responsibilities.

SUMMARY OF STATEMENT BY MARSHA LEVICK, LEGAL DIRECTOR OF THE NOW LEGAL DEFENSE AND EDUCATION FUND

Ms. Levick spoke in favor of the amendment as a means of eliminating sex-based distinctions in family law and providing a constitutional foundation for equitable principles in the area of domestic relations.

FAMILY LAW BASED ON GENDER DISTINCTIONS

The American system of family law is rooted in sex-based distinctions and stereotypes, resulting in a body of law, which more than any other area of the law, looks almost exclusively to gender for a determination of rights and responsibilities. This phenonenon derives from an adherence to the common-law notion of the unity of husband and wife.

SEX-BASED DISTINCTIONS IMPACTED ALIMONY, CUSTODY AND MARITAL PROPERTY

The unified perception of husband and wife resulted in sex-based distinctions in the area of alimony, custody and marital property. Thus, for example, the notion that only wives were eligible for alimony at the time of the divorce derives directly from the common law presumption that the husband was the sole wage earner. In return for his support, the husband had an absolute right to his wife's services and any economic benefits derived therefrom. Thus, the law provided husbands with a variety of actions in tort to redress injury to the wife or the loss of her services, without affording wives this same right.

Sexual stereotypes also influenced the development of the rebuttable presumption in custody cases that favored the mother as custodian of young children. This presumption was based on the belief that women belonged in the home where they could exercise their presumed superior abilities as nurturers and caretakers.

Sexual distinctions with respect to marital property have put women, both homemakers and wage earners, at a serious disadvantage. An award of marital property to the homemaker wife at divorce was often viewed as a gift to her, rather than tangible recognition of her ownership rights earned by virtue of her contribution of homemaking services. A wage-earning wife who used her own income or assets as a contribution toward the acquisition of marital property often discovered at the time of divorce that her husband was considered the sole owner of the property simply because of a tradition of titling property in the husband's name. Some courts lack the statutory authority to transfer titled property between spouses, thus leaving the wage-earning wife with no redress despite an ability to prove legally the nature and extent of her contribution.

The common-law unity of husband and wife has in principle been widely rejected. However, its lingering effect is continually evident in court decisions interpreting contemporary domestic relations. These decisions ignore the reality of marriage today as an economic and social partnership of equals.

STATE ERA'S HAVE FORCED MODIFICATION OF TRADITIONAL FAMILY LAW

There have been some examples of legislative and judicial developments which recognize and incorporate the changing view of the American family, such as the adoption of community property schemes and such model legislation as the Uniform Marriage and Divorce Act. However, one of the most important sources of support for this view has been supplied by State equal rights amendments. The manner in which State ERA's have forced a modification of traditional family law helps emphasize the importance of the Federal ERA to the ultimate achievement of equality for all women across America.

State ERA's have influenced child support by recognizing the value of the non-working parent's custodial non-monetary contribution in caring for the child. The result is support awards consistent with the abilities and capacities of each spouse to contribute and an avoidance of the artificial and rigid imposition of an equivalent financial contribution on the non-working spouse.

Alimony awards have also been affected by State ERA's. In these States, sex is no longer the basis for determining who bears the alimony obligation. Rather, provisions have been enacted to award the dependent spouse in a marriage with alimony, regardless of gender. State ERA's have also caused an invalidation of State laws imposing arbitrary maximum limits on the amount of support a woman could be awarded, as inherently discriminatory.

Child custody has also been impacted by State ERA's. In the twentieth century the court developed the tender years doctrine that presumed the best interests of young children were served by awarding custody to the mother. Recognizing that this judicial pre-

sumption might operate to the detriment of the child, most jurisdictions have rejected the tender years doctrine. Where the issue has been definitively addressed, State ERA jurisdictions have, either by statute or case law, discarded the doctrine. This has not however resulted in wholesale denials of custody to the mothers who previously benefitted from the tender years presumption. Rather State courts and legislatures have opted for an approach which affords each parent an equal right to custody with the award of custody ultimately being determined by the unique facts of each case.

State ERA's have also aided in the elimination of sex-based classifications regarding the issue of management rights over marital property. The problem arises in this area because States have given the right to manage and control the marital property exclusively to husbands. Even the eight community property States whose rules are premised on the idea that husband and wife have equal ownership rights have rules which give this exclusive right to husbands. After adoption of an ERA in New Mexico, Massachusetts and Washington, these states repealed sex-based provisions and replaced them with rules extending management rights equally to husbands and wives. A similar pattern can be seen in common-law property States.

Courts have also considered and invalidated sex-based legal presumptions with regard to ownership of property acquired during the marriage as violative of the State ERA's. For example, following ratification of the ERA in Pennsylvania, the Pennsylvania Supreme Court in *DiFlorido* v. *DiFlorido* (331 A. 2d 174 (1974)), rejected the sex-based presumption that the husband was the owner of household goods even though the goods were used by both husband and wife. The court in *DiFlorido* replaced the husband-ownership presumption with a joint partnership approach that acknowledged the homemaker-wife's contribution. The Virginia Legislature has also enacted a statute invalidating the presumption that the husband is the owner of the wife's property.

The recognition of the value of homemaker services that has been extended to women by the passage of State equal rights provisions in the areas discussed above has resulted in the development of a new presumption of equal partnership and ownership requiring equal distribution of marital assets at the time of divorce. This doctrine has replaced the traditional sex-based presumption placing ownership of all marital property in the husband unless the wife could prove that she had financially contributed to the acquisition of the property.

WHAT WOULD THE FEDERAL ERA ACCOMPLISH IN THE AREA OF FAMILY LAW?

The State ERA's have provided a substantial benefit to families by considering the needs, abilities and contributions of each family member rather than relying on antiquated rules founded on sexual stereotypes as a basis for judgments. State ERA's have also provided a faster, more efficient and a more comprehensive reformation of laws pertaining to families than States which have not enacted ERA provisions in their constitutions. The State ERA's success in

reforming family law illuminates the benefits that the proposed Federal Equal Rights Amendment could provide for both men and women in all 50 States.

SUMMARY OF STATEMENT BY LYNN D. WARDLE, PROFESSOR OF LAW, J. REUBEN CLARK LAW SCHOOL, BRIGHAM YOUNG UNIVERSITY

Professor Wardle testified as to what he sees as the generally detrimental effect the Equal Rights Amendment would have upon traditional family relations and responsibilites.

Professor Wardle believes that the Equal Rights Amendment would have four general consequences upon American family law. First, there would be an abundance of litigation challenging existing domestic relations statutes. Second, family law as a whole would be constitutionalized. Third, spouses' general rights and obligations would be equalized, thus encouraging the independence and development of women. Fourth, existing family laws which support wives and mothers would be significantly impaired. The detrimental effects of the first, second, and fourth consequences would outweigh the positive effects of the third.

PROVOCATION OF ABUNDANT LITIGATION

At this time family law litigation comprises between one third and one half of all civil litigation. Passage of the ERA would accelerate this trend, as evidenced in States which have enacted Equal Rights Amendments within their own constitutions. Similarly, issues revealed in 14th amendment equal protection clause challenges would resurface under the ERA. Overall, existing State statutes would be challenged, flooding the courts.

State statutes involving the husband-wife relationship which authorize only a woman's action for breach of promise to marry, prohibit homosexual marriage, and sanction a female minor's right to marry with parental permission at a younger age than males would all violate the ERA.

As interpreted through a series of State cases, State common law and statutory provisions regarding marital rights and responsibilities would be altered by the ERA. It could be argued that all of the following provisions violated the ERA, and therefore result in extensive litigation: husband's recovery for alienation of affections or action for criminal conversation (adultery); collection of wife's taxes from husband's wages; use of the term "housewife" in tax statutes; higher insurance rates for males; greater exemptions or deductions for women in computing old age benefits, although in *Califano* v. *Webster* (430 U.S. 313 (1977)), this was not seen to violate the 14th amendment; higher rates for female versus male policy holders of disability insurance; aspects of tenancy of the entireties and other provisions which handicap a wife's control over property.

Within the realm of divorce and interrelationships of former spouses, similar ERA challenges could be developed. As seen in States with local ERA's, statutes allowing a divorce award of separate maintenance or an *in rem* support remedy (jurisdiction over a husband through his in-state property not ordinarily attachable) to the wife would only be open to ERA query. Similarly, Government

benefits or exemptions for widows over widowers, which did not violate the 14th amendment in *Kleen* v. *Shevin* (416 U.S. 351 (1974)), yet did in *Weinberger* v. *Weinberger* (420 U.S. 636 (1976)), as well as exemptions of a wife from liability for funeral expenses of her husband would evolve as issues for ERA scrutiny.

In assessments of child support, the divorced mother's earning potential, not just actual earnings, might have an effect on the amount of the award. No longer would it be the primary obligation of the father to support the children and the mother's only to contribute to the extent the father was unable. The potential earning power of the mother would be translated into an ability to contribute equally with the father for support of the children. Within custody disputes, any statutory preference for the mother, be it a prima facie or "tie-breaker" presumption, would violate the ERA if the result of custody cases evidenced a disparate impact (i.e., more women than men receiving custody).

Within paternity suits and adoptions new issues would be created. Under the ERA, States could not bar a man from bringing a paternity action against a married woman who is not his wife. An unwed mother would need full consent of the unwed father in order to release her child for adoption. Likewise, any law restricting public funding of abortion would violate the ERA.

CONSTITUTIONALIZATION OF FAMILY LAW

Although family law has exclusively been the province of the States, under the ERA it would be constitutionalized to the point that the State's contribution to the law would be curtailed and traditional legislative development and reform severely restricted. Family law principles would no longer evolve along flexible common law standards, but rather within the brittle, inflexible process of constitutional adjudication within the Federal judiciary. Whereas to date there has been limited Federal involvement in domestic relations law, only in regulation of taxation, bankruptcy and military personnel issues, with the passage of the ERA, the Federal judiciary would sit as a "super legislature," establishing a uniform domestic relations law for a plurality of States.

EQUALIZATION OF FAMILY RIGHTS AND RESPONSIBILITIES AMONG SPOUSES

Many of the progressive changes in family law which ERA was supposed to instigate have already come about in States with and without ERA's in their constitutions. Encouraging responsibility among fathers, removing barriers to opportunities outside the home for wives and mothers, and the development of self sufficiency and independence among women are the laudable results. These results are evidence of a continuing trend breaking down those coercive stereotypes that the ERA was proposed to combat.

IMPAIRMENT OF EXISTING LEGAL RIGHTS OF SPOUSES WITH TRADITIONAL FAMILY RESPONSIBILITIES

Based on experiences in several States which have their own equal rights amendments, traditional family responsibilities as well

as family law and policy will undergo provocative and far-reaching changes if the nation-wide ERA is adopted.

Traditional concepts and policies toward marriages would be affected. Gender-based distinctions regarding marital age would be abolished. Eventually, an argument mandating lawful homosexual marriage might be built on reasoning similar to that used in *Loving* v. *Virginia* (388 U.S. 1 (1967)), where laws which condemned mixed race marriages were found unconstitutional under the 14th amendment. Laws which require and/or presume that a bride take her husband's surname would be unconstitutional. Similarly, assumption of the husband's domicile could not be required or presumed. Under the ERA, a married woman could sue for loss of consortium and, in the case of divorce, have the same obligation of spousal support imposed upon her as is imposed upon her husband. Regarding marital property, laws that vest management and control of property exclusively in the husband would be unconstitutional. There might even be a major revision of inter-family property laws resulting in a community property system in all States.

The rights and responsibilities of spouses after death or dissolution of the marriage would also be affected. Dower and curtesy property schemes which involve tailoring the right of a survivor's share or amount based on sex-role distinctions between widows and widowers would be unconstitutional. Alimony and spousal maintenance provisions would have to be sex-neutral, and this could possibly affect existing spousal support orders. Tax exemptions and special favoritism to widows in Government programs would violate the ERA. It would be required that divorce and annulment be available to women on the same grounds as to men.

Vast changes in parenting would result. Strict statutes of limitation on paternity suits which unduly restrict the rights of unwed fathers would be stricken down. Statutory rape laws and punishments leveled for incest might be changed to reflect a gender-neutral approach. Statutes dealing with abortion would take a greater position of neutrality despite public policies favoring childbirth. The State could not require or presume that the child take the same name as his or her father. In the case of divorce, child support obligations would be the same for both father and mother. Similarly, it is likely that mothers with marketable job skills might be required to leave home and return to work earlier under the ERA. Any distinctions between married/unmarried mothers and fathers regarding benefits and grants would be disregarded by the ERA, causing a significant impact on existing social programs.

In the realm of child custody decisions, no presumptions or requirements based on sex, such as the tender years doctrine, regarding which parent is a proper guardian could be sanctioned by the ERA. Similarly, the sexual preference of the parent under consideration might not be a valid reason under the ERA for a refusal of custody.

CONCLUSION

Basically, the Equal Rights Amendment would abolish laws deferential to mothers and wives. We would see the development of unisex spousal and parental responsibilities favoring adult single,

independent lifestyles, as well as small families or no families. Traditional notions of marriage and family would be jeopardized. Any incentives favoring housewives would be abolished, forcing the woman out of the home.

Summary of Questions and Answers

The questions were based primarily on an analysis done by the Equal Rights Amendment Project, "A Commentary on the Effect of ERA Upon State Laws and Institutions."

Senator Hatch first inquired as to whether a State law that was inconsistent with the ERA would be rendered unconstitutional. Both Professor Wardle and Ms. Levick stated that it would be, if challenged in court.

OBLIGATION TO SUPPORT FAMILY

Senator Hatch asked if the witnesses would agree with the statement by the ERA Project that State laws placing the primary obligation to support the family upon the husband would be unconstitutional under the ERA. Professor Wardle said that it would, assuming that a stricter standard of scrutiny is applied than under the 14th amendment. Ms. Levick noted that the male-only requirement of support has already been stricken by the Supreme Court under the equal protection clause.

Professor Wardle elaborated upon his response, stating that the Senator did not say male-only "requirement" but rather "primary duty." There is a difference between a requirement that the man be the support of the family and an assumption that the primary support comes from the husband. The ERA would make the primary obligation unconstitutional because this obligation could not be based on sex and husband is a sex classification. Thus it would be possible for a creditor to sue either party for a debt that is owed.

Ms. Levick responded that what Professor Wardle is referring to, in part, is the doctrine of necessaries. While that doctrine appears to suggest that it supports the principle of the husband's obligation of support for the wife, it has never been so used and thus has never been available to the wife to enforce that obligation of support.

The doctrine of necessaries has always been available only to creditors who seek to enforce debts owed for particular kinds of services provided to the husband or to the wife. There have been cases involving State ERA laws which have looked at the constitutionality of this doctrine, and many of these cases have determined that, rather than invalidate these laws or extend them to husband and wife, they would return the issue to the legislature and let the legislature decide what would be the appropriate allocation of rights.

Senator Hatch inquired as to whether it would be (1) fair and (2) constitutional to expect States to revise their family support laws to place an equal duty of support upon both spouses if the ERA is passed.

Ms. Levick stated that this would be constitutional, but stressed that it is important to recognize what the obligation of support would mean in this context. In ERA States, obligation of support

has not been translated into a requirement of equal financial contribution but rather a recognition that non-monetary support can also fulfill that obligation. Professor Wardle replied that the ERA would impose an obligation of support on both husbands and wives, and both fathers and mothers.

Senator Hatch then asked whether criminal nonsupport laws would be rendered unconstitutional to the extent that they placed unequal obligations upon husband and wife. Both witnesses agreed that this would be the result.

COMMON LAW MARRIAGES

Senator Hatch asked the witnesses to comment on the ERA project's statement that laws against common law marriages would possibly be in violation of the ERA, since such laws deny women important benefits, including the right to property accrued by the husband during the marriage. Both witnesses agreed that this is an emerging area of the law which is not in flux, so that it is difficult to predict whether common law marriages would be stricken. Professor Wardle noted that this is certainly a possibility; while Ms. Levick stated that there has been an enormous development in this area regarding the rights of parties to property and to share in property distribution even though they have not been married, so invalidation might not be required.

LOSS OF CONSORTIUM

The ERA project states that loss of consortium statutes will be unconstitutional under the ERA unless the wife is also accorded an independent cause of action for the same occurrence. Both witnesses agreed with this statement, with Ms. Levick noting that this has in fact happened in many equal rights cases.

Senator Hatch asked if Congress passed a law under the ERA mandating consortium rights to both parties, would all States have to abide. Professor Wardle said that they would. Ms. Levick responded that she did not know if Congress would do that. One of the points that can be derived from this discussion is that there have been so many positive changes already, both as a result of the ERA passage in some States and the debate that it has fostered, that should also somewhat curb some of the concerns about the enormous amount of litigation that might flow as a result of the passage of a Federal ERA.

In response to Ms. Levick's assertions about the positive effects that State ERA's have had, Professor Wardle stated that the same sorts of advances have been made in States that have not adopted an ERA. He claimed that an ERA is not necessary to achieve the types of reforms Ms. Levick advocates.

Professor Wardle also stated that the amount of litigation has continued to increase over the last few years, and he was unaware of any statistical study showing that there has been less family law litigation or a drop in the family law litigation in those States that have adopted States ERA's. Ms. Levick responded that she had not said that State ERA's had reduced the amount of litigation in the area of family law, but had merely wanted to make the point that there had not been an enormous spurt in the amount of litigation

under State ERA's in all areas of the law. To the contrary, there has been very little litigation.

SURNAMES

Senator Hatch asked if the witnesses agreed that laws which either require or presume that a wife take the surname of her husband upon marriage will be in violation of the ERA.

Ms. Levick agreed that it would be a likely result, but noted that women have the right not to take their husband's name without an Equal Rights Amendment.

Professor Wardle also agreed that this would be a likely result. He noted that the classic article, the Brown, Emerson, Falk and Freedman article, says that even the presumption that a married woman takes the name of her husband would be unconstitutional.

Senator Hatch asked whether it would be unconstitutional under the ERA to have laws which either require or establish the presumption that the child or any children take the surname of the male parent. Both witnesses agreed that it would be unconstitutional.

DOMICILE

Senator Hatch inquired whether it would be unconstitutional to require spouses to take the same domicile under the ERA. Ms. Levick replied that if the State is imposing equal obligations on both spouses, that would not run afoul of the ERA.

Professor Wardle generally agreed, but said that to the extent that such a rule requiring married persons to have the same domicile as each other would treat married women and men differently than unmarried women and men and give them a different right solely because of their relationship with a person of the opposite sex, and argument could be made that those laws would be unconstitutional.

Both witnesses agreed that laws which require children to take the same domiciles as their fathers will be unconstitutional under the ERA.

AGE OF MARRIAGE

Senator Hatch asked whether the witnesses agreed with the ERA project statement that all laws which establish different ages at which men and women may marry would be unconstitutional.

Ms. Levick agreed that they would, because these laws perpetuate the sex stereotype that women ought to get married at an earlier age than men because that is the appropriate course for them.

Professor Wardle agreed, but expanded on these comments. He said that there are about 10 States that permit women to get married with parental consent at a younger age than men can get married with parental consent; however, in this context we are not talking about men and women but rather about boys and girls. He agreed that those State laws which had different ages for marriage for such boys and girls would be unconstitutional.

ILLEGITIMATE CHILDREN

Senator Hatch asked whether following the adoption of the ERA, the law would have to accord equal rights to the natural mother and the natural father of a child born out of wedlock. He noted that Professor Amy Freedman has stated that the ERA would result in the overturning of a 1979 Supreme Court decision, *Parham* v. *Hughes* (99 S. Ct. 1742 (1979)), in which the Court upheld a Georgia statute treating the father and mother of illegitimate children differently for purposes of "wrongful death" statutes.

Both witnesses agreed with Professor Freedman's analysis. Professor Wardle stated that this would make it harder than it presently is for an illegitimate child to be adopted. Those laws which are based on a presumption that the mother of a child born out of wedlock has a greater interest in the child would be struck down.

ABORTION

Senator Hatch asked whether the ERA would establish equal rights in the mother and the father with respect to the abortion decision.

Ms. Levick stated her belief that the Supreme Court has made clear under its privacy analysis in *Danforth* that the right of consent to an abortion resides with the mother alone and that the Court could never, in any circumstance, give a third party the right to veto that decision. She does not believe this would be changed by the ERA.

Professor Wardle replied that the effect of the ERA on that state of affairs is unclear. It could be argued that the father has to have an equal right and thus a married women needs her husband's consent or an unmarried women needs the father of the unborn child's consent to destroy that life in being. On the other hand, it could be argued that this is a part of the right of privacy, which is one of the exceptions to or qualifications of the absolute standard of the ERA.

PREGNANCY BY ANOTHER MAN AT THE TIME OF MARRIAGE AS GROUNDS FOR DIVORCE

Senator Hatch asked whether the ERA would render unconstitutional such State laws as those which permit a divorce on the grounds that a woman was pregnant by another man at the time of her marriage.

Ms. Levick replied that such a State law again perpetuates the notion that there is something special and possessive about a husband's right to his wife that the wife does not share in regard to her husband. She thinks that those laws would be ruled unconstitutional.

Professor Wardle said that most commentators state that those laws would be ruled unconstitutional, but he does not think their analysis is good. The assumption that underlies the rule that allows a man to annul a marriage if his wife was unknowingly pregnant by another man at the time of marriage is not based on any notion that the husband can have sex with whomever he

wants and the women can only have sex with her husband. Rather, it is based on the violation of one of the fundamental assumptions of marriage itself, that during marriage the women conceives and bears children only of her husband and not anyone else. He did not know to what extent this might come within the unique physical characteristics exception to the ERA.

CHILD CUSTODY

Regarding child custody, Senator Hatch asked whether or not the so-called "tender age" laws which establish the presumption of custody in the mother would be unconstitutional under the ERA. Both Ms. Levick and Professor Wardle agreed that they would. Senator Hatch asked whether or not new forms of child support enforcement and debt collection laws would be required. Ms. Levick replied that those States which had enforcement mechanisms for other kinds of civil debts would probably be required to extend them to support awards. Professor Wardle agreed.

Senator Hatch asked whether or not the Uniform Reciprocal Enforcement of Support Act would be unconstitutional under the ERA because it imposes a different duty of support for women from that of men. Both witnesses agreed that it would be unconstitutional. In response to a question regarding the constitutionality of State alimony laws which only allow alimony to the wife upon divorce, Professor Wardle indicated that such was the holding of *Orr* v. *Orr* (99 S. Ct. 1102 (1979)). Senator Hatch then asked if a long-term analysis of the allowance of alimony awards indicated that a higher percentage of these awards went to women, would the law in such a jurisdiction be unconstitutional because of its "disparate impact." Ms. Levick replied that she did not think it necessarily would. Professor Wardle commented that there is a tension between *de facto* and *de jure* discrimination, and that in cases where there is sex neutral language, requiring equality in outcome could lead to the establishment of quotas, thus changing the effect of sex neutral language. Ms. Levick referred to two instances in Colorado where the court rejected the contention that unequal custody awards amounted to disparate impact, on the grounds that the awards reflected a reasonable judgment of the court considering the circumstances rather than discrimination on the basis of sex. Professor Wardle responded that since the court stated that the basis for their conclusion was that the statistics presented showed that more women than men got custody, but did not indicate whether the men in those cases wanted custody, the specific language of the Colorado Supreme Court seemed to indicate that if the men had wanted custody and a greater percentage of women got custody than did men, then there would be a violation of the State ERA.

Ms. Levick disagreed that the Equal Rights Amendment would require equality of results. Professor Wardle asserted that arguably the purpose of the ERA is to make sex be treated as race is under the 14th amendment, under which we now have affirmative action programs and in some instances quotas. He hoped that the same results would not occur in the field of sexual equality in family relations, custody, and alimony.

ALIMONY

Senator Hatch then asked whether awards of alimony based upon concepts of fault would be unconstitutional under the ERA. Ms. Levick replied that it depended upon the circumstances. She said that in the past women who have been at fault have been awarded lesser support, whereas men who have been at fault have not been penalized with a greater amount of support. She accordingly concluded that the use of fault would not be *per se* unconstitutional, but would be subject to a disparate impact analysis.

In response to a question from Senator Hatch, Ms. Levick stated that the termination of alimony upon remarriage of the spouse receiving the alimony would not be a violation of the ERA.

Returning to the issue of fault, Professor Wardle cited a study by Professor Lenore Weitzman, which indicated that, although many States had abandoned the notion of fault in order to help women, the no-fault divorce statute in California "impoverishes women and children." According to Professor Weitzman, there is no longer a presumption that the woman should receive a substantial alimony award.

Senator Hatch referred to the position taken by the ERA Project, to the effect that termination of alimony, as it currently works, would be unconstitutional. According to that report, "Under current practice, a wife's remarriage terminates alimony payments and a husband's remarriage often serves as a reason to reduce the amount of alimony owed his former wife. Again, to the extent that alimony serves as pay for uncompensated work performed during marriage, to end alimony upon remarriage will, in many instances, serve to discriminate against a wife who worked without pay in her former home." Ms. Levick reiterated the point made earlier that alimony payable only to women has been struck down in most States. Thus, in her view, so long as there was equal treatment of men and women regarding the effect on alimony of remarriage of the receiving party, there would be no violation of the ERA. Ms. Levick then commented on the Weitzman study, saying that one of its important findings was that it was the lack of credibility and value accorded to women as homemakers which contributed to their "improverishment," and was not necessarily related to whether the State has a fault or no-fault divorce law.

Senator Hatch then indicated that the ERA project had concluded that laws which cause courts to deny women custody upon proof of adultery or misconduct but which do not apply similarly to men would be rendered unconstitutional under the ERA. Both Ms. Levick and Professor Wardle agreed that they would.

RETROACTIVITY

Senator Hatch stated that the present Solicitor General Rex Lee, has written that the ERA will not only affect the prospective application of State alimony and custody laws, but that it would also call into question existing alimony and custody orders handed down under invalid laws. Ms. Levick replied that Congress could, in its legislative history, indicate its view of the retroactivity of the amendment and the extent to which it would require a reopening of such decrees. Senator Hatch then quoted Marna Tucker, a previ-

ous witness, who had argued that existing alimony and custody orders would be opened up if the ERA were deemed to constitute a "major change in circumstances." Ms. Levick responded that custody and family relations law has typically looked to changes in fact as changes in circumstances, and that she was not certain how a change in the law would be treated. She expressed the position that the ERA might require a reconsideration of some of the awards, but that it would not be to a greater extent than such awards are currently being reopened. Professor Wardle took exception to the statement made by Ms. Tucker. He argued that the ERA would be a constitutional amendment, and would thus supersede the statutory or common law standard of "major change in circumstances" for reopening the orders awarding custody or alimony. Thus the existing requirements would not have to be met. Regarding retroactivity, he said that one effect, requiring that a woman given a greater amount of money under the pre-ERA standard than she would be due after it to return the excess, would probably not occur. Professor Wardle indicated, however, that when challenged in court, an unconstitutional decree could not be allowed to stand. Ms. Levick added that in her view such reopenings would rebound to the benefit of those women who had not been accorded to full value of their homemaker status in prior awards.

OTHER LEGAL CONSEQUENCES

Turning to another set of possible legal consequences of the ERA, Senator Hatch asked whether tax exemptions or other benefits available only to widows would be unconstitutional. Both witnesses agreed that they would be. He then asked if the decision in *Kahn* v. *Shevin* (94 S. Ct. 1734 (1974)), would be overturned. Professor Wardle stated that he believed it would, since it was decided by the 14th amendment, and the ERA is intended to go further and be tougher than that amendment. Ms. Levick disagreed, arguing that the ERA does not prohibit an affirmative action rationale in looking at cases of sex discrimination, so it would not require a reversal of *Kahn* v. *Shevin*, but that in her view it was likely that under the ERA the decision would be reversed. Senator Hatch cited the ERA Project to the effect that separate property systems or common law property systems will arguably be unconstitutional under the ERA since they are neutral on their face but discriminatory in effect. Ms. Levick replied that the continuing discriminatory effect of common law property has largely been minimized by the passage of equitable distribution laws that abandon the presumption of the superiority of the man's claim to the property. To the extent that such discrimination still lingers, she said, such title laws would be invalid under the ERA. Professor Wardle said that the ERA would invalidate key portions of integrated common law property systems and thus compel total revision of those common law systems in order to keep the systems coherent. In response to Senator Hatch's question regarding whether the ERA would require a system of community property such as exists in certain of the western States, Ms. Levick replied that such a question is academic since in most States equitable distribution laws and the adoption of the Uniform Marriage and Property Act have eliminated the discriminatory

effect of the property systems. Professor Wardle argued that such community-property like systems would be required, although that particular system would not be. Senator Hatch asked whether, as the ERA project indicates, common law dower or curtesy, as well as "forced share" statutes would be unconstitutional. Professor Wardle answered that to the extent that those provisions grant a widow protections not available to a widower, they would be discriminatory and thus unconstitutional. Senator Hatch asked about tenancy by the entirety, which both witnesses agreed would be unconstitutional in those few States which still have gender-based discriminatory entireties laws.

LONG TERM SOCIAL EFFECTS

Senator Hatch quoted the National Conference of Catholic Women that "The ERA would destroy the safeguards society has erected around the wife and the mother as the center of the family." Professor Wardle agreed with the statement, saying that "That is the gravest concern I have, because it would purge the law and purge public policy of any presumption that favors or encourages the woman to assume a full-time role in the home, because that is a sex-based presumption." Ms. Levick's position was that the effect of the current laws is not to the benefit but rather to the detriment of women who choose to become homemakers, and that "the ERA would do a great deal to ameliorate their condition and not to harm it."

Senator Hatch cited the California Commission on the Status of Women for the proposition that "The ERA would nullify the existing marriage contract and encourage a redefinition of marriage." Professor Wardle suggested two possible results: One, to "encourage private contracts without any State supported assumption about sex-based roles, who will raise the children"; and two, homosexual marriage. He said that the concept of marriage as a union between persons of the opposite sex may be held violative of the ERA. Ms. Levick said that there was no precedent to suggest that the ERA would be interpreted as requiring homosexual marriage. Professor Wardle argued that it may well be interpreted that way, since the current law says that, as a male, a female may be a marriage partner, but not another male—which is discriminatory. Ms. Levick's view was that the ERA addresses only discrimination between homosexuals on the basis of sex, and would not reach the issue of homosexual marriage. Professor Wardle analogized this issue to that in the case of *Loving* v. *Virginia*, in which the Supreme Court struck down a statute which prohibited interracial marriage. He said that the Court held that it was unconstitutional to say that a man can marry one woman and not another because of her race. Using the same logic, substituting sex for race, Professor Wardle concluded that the prohibition against homosexual marriage would also be unconstitutional.

Again quoting from the California Commission, Senator Hatch asked about the long term effects of the ERA on the nuclear family: "Women will become much less ambivalent about their roles when they are expected to provide partial economic and partial emotional support for their children. When women are con-

vinced that mothering is a learned behavior they will begin to feel much more comfortable about choosing to forego the role entirely. The form of the family may change. Probably there will be much more variability in the composition of the unit so the family will not mean nuclear family but any group of people living together and cooperating in an economic and affectional unit over a period of time. Perhaps the nuclear family will still prevail, perhaps not."

Ms. Levick responded that, although women perceive their roles differently today, there is no evidence that the ERA would "spell the doom of the nuclear family."

Professor Wardle shared the concerns of the California Commission, saying that the proponents of the ERA want the amendment to reflect the view that "all differences between men and women, except for physical differences, are learned differences and the law cannot take account of those differences. That would destroy assumptions and presumptions that have supported and reinforced traditional mores and which have encouraged homemaking, would encourage men to support their families and a primary responsibility and that, I think, is of grave concern."

EXCEPTIONS CONTAINED IN THE EQUAL RIGHTS AMENDMENT

INTRODUCTION

On August 7, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding exceptions contained in the Equal Rights Amendment.

Catherine H. Zuckert, a professor at Carleton College, argued that the "absolute" language of the present ERA proposal would bar all exceptions and said that she favored a modified version of the amendment.

Jules B. Gerard, a professor of law at Washington University, argued that the "absolute" language of the proposed Equal Rights Amendment means that it is unlikely that the courts in the future would use the right of privacy or the unique physicial characteristics principle to shield personal modesty from attack under the amendment, contrary to claims by proponents of the amendment.

SUMMARY OF STATEMENT BY CATHERINE H. ZUCKERT, PROFESSOR, CARLETON COLLEGE, NORTHFIELD, MINNESOTA

Arguing that the "absolute" language of the present ERA proposal would bar all exceptions, Professor Zuckert favored a modified Equal Rights Amendment that would incorporate both a constitutional presumption against sex discrimination and a standard of review modeled after the intermediate standard now employed by the Court to resolve questions of sex discrimination under the equal protection clause. She said an amendment modified in this manner would allow such exceptions as those recognizing unique physical characteristics and permitting affirmative action for remedial purposes, among others, that are erroneously claimed by proponents to be permissible under the present ERA language. Although advocating these changes, she emphasized the need to amend the Constitution to provide a permanent basis for equal rights for women.

WHY THE LANGUAGE OF THE CURRENTLY PROPOSED AMENDMENT SHOULD BE CHANGED

Objections to the ERA do not appear to be based on opposition to the principle of securing equal opportunity for women, but to the "absolutist" wording of the proposed amendment. Where the attempt to ratify the ERA has failed, Congress and the Supreme Court have succeeded in extending opportunities for women using a more limited standard. As a result of Federal legislation and Supreme Court decisions, the presumption is now against discrimination on the basis of sex, thus pointing to a practical standard and acceptable wording. Unlike the ERA language currently proposed,

which would absolutely bar all legal distinctions, a modified amendment incorporating a general presumption against sex discrimination and a standard of review based on current Court practice, e.g., the intermediate standard, would allow certain exceptions.

Indeed, the question before this hearing is the status or desirability of such exceptions. Should the Constitution absolutely bar legal distinctions on the basis of sex, as the present wording mandates; or should it create a strong presumption against sex-based distinctions? Should distinctions on the basis of sex be allowed when, but only when, it has been shown that such distinctions are "substantially related to an important government objective," to use the language of the intermediate standard currently employed by the Court?

EFFECT OF THE CURRENTLY PROPOSED AMENDMENT ON SPECIFIC EXCEPTIONS

(1) Unique physical differences

Some proponents of the current ERA language argue that it would allow the law to take account of unique physical differences. If it is legitimate to take account of physical differences with regard to reproduction, however, the discrimination we are concerned about is not discrimination "on account of sex." Rather, if we are trying to prevent discrimination on the basis of archaic stereotypes and overly broad generalizations, the wording of the amendment ought to make that clear.

In 1976, the Supreme Court rules that differential treatment of pregnancy as a disability was not contrary to the prohibition of sex discrimination in title VII of the 1964 Civil Rights Act, that the distinction did not involve men and women but "pregnant and nonpregnant persons," since women are in the latter category much of the time.[1] Subsequently, Congress amended title VII to clarify its intent that discrimination on the basis of sex included discrimination on the basis of pregnancy. Perhaps the Court would interpret the currently proposed ERA language in terms of the congressional revision of title VII, but it would be better for Congress to state its intentions as precisely as possible in the amendment itself. The currently proposed amendment does not allow any exception on the basis of "unique physical characteristics."

(2) Affirmative action

Proponents of the current ERA language argue that affirmative action programs would be allowed as an exception to the amendment's mandate for equal treatment because the Court, in interpreting the ERA language, would consider the intent of these and other compensatory programs, e.g., to help women overcome historic disadvantages. Proponents note that the Court has allowed racial distinctions in the form of quotas for remedial purposes, although race is a suspect classification under the current Court reading of the 14th amendment.

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[1] See, *General Electric Company* v. *Gilbert* (429 U.S. 125 (1976)).

However, if the current ERA language were added to the Constitution, it would be difficult to defend a policy mandating preferential hiring, or any other particular benefits to women, under the current proposal's ban against all distinctions "on account of sex." If Congress intends to create a presumption against sex-based discrimination, but to allow distinctions on the basis of sex for certain limited purposes, the language of the proposed amendment ought to communicate that intention more clearly. It should not proscribe all distinctions "on account of sex" as it does at present.

(3) "Separate but equal" athletic programs

The difference between a policy seeking to assure equal opportunities for the two sexes and a policy mandating the abolition of all distinctions on the basis of sex may be seen most clearly in the controversy surrounding the status of "separate but equal" athletic programs under title IX of the 1972 Education Amendments. The gains made by women in both physical fitness and athletic competition have occurred largely in the context of all-female teams. Single-sex teams are permissible under current law if they are shown to be substantially related to an important government objective, e.g., the encouragement of team play, sportsmanship, and general physical development as an integral part of an individual's education. Under the currently proposed amendment, it would be difficult to deny the right of any male to compete for a place on a formerly all-female team, even though such competitions probably would result in two predominantly male teams.

(4) Single-sex schools

Under title IX regulations, single-sex religious schools are excluded from coverage if application of the regulations would not be consistent with the religious tenets of the organization controlling such a school. Nor is maintaining private women's colleges a problem under current law, but continuation of either of these kinds of schools would be difficult under the currently proposed amendment. Ironically, sociologists David Reisman and Christopher Jencks have argued that single sex-education may be particularly beneficial in enabling women to seek and to achieve positions of leadership and authority.

(5) Military service

The language of the proposed ERA would require registration and drafting of women and probably would prohibit restrictions on combat assignments. By contrast, present Court doctrine does not require either drafting of women or assigning them to combat, because under the intermediate standard the national defense is clearly an important governmental objective to which distinctions on the basis of sex are substantially related. It is also important to note that present Court doctrine does not prevent Congress from drafting women or assigning them to combat should that prove desirable. The question is not whether women may serve in the military, since many are serving now, but whether we must register (and perhaps draft) all women of eligible age as a matter of principle, without regard to cost, efficiency, or current public sentiments.

(6) Abortion funding

Critics of the current ERA proposal argue that its language would mandate public funding for abortions. Both the Federal Government and the States participating in the Medicare program grant to indigent people a right under law to medical care. Under the proposed amendment, denial of abortions would be denial of medical care "on account of sex," since only women have abortions. In order to separate the ERA from the controversy over abortion (a controversy that has been sufficiently strong to block passage of the amendment) it will be necessary to change the language of the proposed amendment.

Here again, the approach to abortion rights used by both Congress and the Supreme Court has been more moderate than that advocated by either the proponents of the current amendment or various "right to life" groups who support passage of their own constitutional amendment prohibiting abortions entirely. Although the "Hyde amendment" (an abortion restriction attached by successive Congresses to appropriations bills) prohibits the Federal Government from funding certain kinds of abortions, it does not prevent women from having abortions. The Supreme Court in *Roe* v. *Wade* (410 U.S. 113 (1973)), protected a woman's right to terminate her pregnancy during the first trimester free of governmental interference. However, the right granted was not a right to public support in exercising that decision. On the contrary, the right granted women in *Roe* was explicitly balanced by recognition of the legitimacy of a State concern for the preservation of human life. Thus, under current law, a State can legitimately express such a concern by refusing to provide public funds for abortions.

WHY AN AMENDMENT SHOULD BE PASSED

Although the approach taken by Congress and the Supreme Court is superior to the currently proposed amendment, it is still important to amend the Constitution affirming the presumption against sex discrimination that is embodied in current law. First, such an amendment would represent a decisive step in achieving public recognition of the equal rights and status of women. Second, a constitutional amendment would provide a firmer, more lasting basis for the guarantee of equal opportunity to women than either Congressional legislation or Court decisions. Modified language based on current Court doctrine might simply state the following:

> Neither the United States nor any State may distinguish persons on the basis of gender unless such distinction be shown to be substantially related to an important governmental objective.

The Court needs a statement of legislative intent to support and clarify its current holdings. Since its unanimous 1971 decision in *Reed* v. *Reed*,[2] the Court has not been able to agree on the applicable

[2] The *Reed* v. *Reed* decision (404 U.S. 71 (1971)) was the first instance in which the Court held a State law invalid because it discriminated against women. The ruling stated that to be constitutionally permissible, a sex-based classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

standard or the reasons for their subsequent holdings. For example, there has been no stable majority agreement on what exactly constitutes "invidious discrimination" or when exactly members of the two sexes are or are not "similarly situated." With no agreed upon doctrine or rationale to guide them, new appointees to the Court are apt to formulate their own reading of the 14th amendment with regard to sex-based discrimination. A statement of legislative intent in the form of a constitutional amendment embodying the current Court's standard would do much to strengthen and clarify the law with regard to the status and rights of women in America. Unless the proposed wording is changed, however, we are not apt to see such an amendment passed by the Congress or ratified by the States.

SUMMARY OF STATEMENT BY JULES B. GERARD, PROFESSOR OF LAW, WASHINGTON UNIVERSITY, ST. LOUIS, MISSOURI

Professor Gerard argued that the "absolute" language of the proposed Equal Rights Amendment means that it is unlikely that courts in the future would use the right of privacy or the unique physical characteristics principle to shield personal modesty from attack under the amendment, contrary to claims by proponents of the amendment.

WHY THE CLAIMED EXCEPTIONS WILL NOT MODIFY THE ERA'S ABSOLUTE MANDATE

The language of the proposed Equal Rights Amendment is absolute, yet proponents claim that two unstated exceptions are implied that would modify the ERA's uncompromising language. These two implied exceptions are for the right of privacy, and for physical characteristics that are unique to one sex.

(1) The right of privacy [3]

Concern has been expressed about the ERA's potential effect upon matters that may be grouped under the generic heading of personal modesty; matters, for example, such as sex-segregated prisons and college dormitories. Proponents of the ERA claim that a "right of privacy" would take precedence over the ERA's uncompromising language and prevent a multitude of undesirable effects upon personal modesty. The reasons why their claim is unpersuasive are as follows:

(a) The meaning of "privacy" in the "right to privacy" concept has been distorted.—The right of privacy has been used by the Supreme Court mainly as a vehicle for justifying its decisions in abortion cases. As the Court presently defines it, the right of privacy has

[3] Writing for the majority in the *Roe* decision, Justice Harry A. Blackmun discussed the right to privacy as follows: "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . , procreation . . . , contraception . . . , family relationships . . . , and child rearing and education. *Roe* v. *Wade* (410 U.S. 133, at 152–3 (1973)).

nothing to do with personal modesty. Moreover, there is no way to compel the Court to give the word "privacy" its normal meaning.

(b) The so-called right of privacy regarding personal modesty claims would be overridden as inconsistent with the ERA.—The purpose of a constitutional amendment is to change existing law, not to confirm it. Since any amendment added to the Constitution nullifies all previous constitutional doctrines that are inconsistent with the amendment, if a right to privacy that includes personal modesty does exist, traditional rules of constitutional interpretation would require it to be overridden by any inconsistent provision of the ERA. The inconsistency between any personal modesty rights and the ERA is demonstrated by the fact that proponents of the ERA must resort to the right of privacy to protect personal modesty.

(c) The ERA contains no express exception for privacy or any other countervailing right.—The terms of the ERA permits no exception to its mandate of "equality of rights under the law." Therefore, exceptions must be made by judicial interpretation. Restated, the problem then becomes: Which countervailing principles should be held to modify ERA and when should they prevail over ERA's uncompromising language? The right of privacy is nowhere mentioned in the Constitution, and no legitimate theory of interpretation permits a right not mentioned in the Constitution to override by implication one that is expressly granted to individuals. Although proponents claim that the problems created by the ERA's language will be resolved by its legislative history, this claim depends upon two dubious assumptions. First, it assumes that the Court will make use of the legislative history. A number of examples show that the Court will resort to the legislative history as a guide to constitutional interpretation only if it chooses to do so, even when the relevance of the history is indisputable. Second, it assumes that the ERA's legislative history gives clear guidance regarding its potential impact on personal modesty. In fact, the legislative history is ambiguous on this point.

(d) No precedent exists for use of the right of privacy as a constitutional justification for classifying on the basis of sex.—Proponents of the ERA cannot explain why privacy should be the only constitutional right that will modify the ERA's absolute mandate for "equality of rights." For example, in *Roberts* v. *United States Jaycees* (52 U.S.L.W. 5076 (1984)), in which the Supreme Court ruled that the Jaycees organization must admit women to full membership, the Court denied the right to freedom of association, although conceding that requiring the Jaycees to accept women as equal members intruded upon their first amendment rights. The Court said that the State's "compelling interest in eradicating discrimination against its female citizens" justified the intrusion. Although *Jaycees* involved freedom of association rather than the right of privacy, freedom of association (unlike privacy) is derived from the constitution's express language.

Nor is it persuasive to argue that the ERA will require distinctions based on sex to be treated in the same way that distinctions based on race are treated under the equal protection clause. The right of privacy and freedom of association never have been accepted as justifications for otherwise unconstitutional racial discrimina-

tion. There is no reason to believe such rights would be accepted as justifications for sex distinctions that would be made unlawful by the ERA.

(2) Unique physical characteristics [4]

The second exception that proponents of the proposed amendment allege will modify ERA's absolute prohibition against classifications based on sex is stated in terms of "physical characteristics that are unique to one sex."

Although the motivation of the authors in creating this exception is unclear, the discussion suggests that they were anticipating objections to the ERA and were looking for a device that would allow them to argue that some laws favoring women, such as rape statutes, would be unaffected by the ERA. However, knowing that blatant discrimination against women could be articulated in terms of unique physical characteristics, as, for example, requiring that all police officers have testicles, they hedged the principle with subsidiary safeguards to prevent it from being used to circumvent ERA's basis prohibition against classifications based on sex. The hedge they chose was a requirement that classifications based on unique physical characteristics had to be balanced against a complex of six highly technical and intricate "factors." [5] As might have been anticipated of a principle that is simultaneously supposed to achieve the two diametrically opposing goals of allowing and forbidding classifications based on sex, the end result is confusion.

Consider the example of pregnancy, considered by ERA proponents to be a unique physical characteristic for purposes of granting medical benefits to indigent women, such as funding for abortions. When the Supreme Court upheld the constitutionality of a State-funded medical insurance plan that excluded coverage of childbirth,[6] ERA proponents argued that this denial was discrimination on the basis of sex. Yet, in a later case, when a Federal court overturned a State maternity leave statute granting special rehiring benefits to women [7] (under the anti-discrimination provisions of title VII), proponents argued that this decision was unfair.

I do not argue that the unique characteristics principle is utter nonsense; but before we add the uncompromising language of the ERA to the Constitution we ought to have a clear idea of the extent to which it will permit laws to take account of physical

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[4] Barbara A. Brown, Thomas J. Emerson, Gail Falk, and Ann Freedman: "The Equal Rights Amendment: a Constitutional Basis for Equality for Women." Yale Law Journal, vol. 80, April 1971, p. 893. The relevant passage reads: "The fundamental legal principle underlying the Equal Rights Amendment . . . is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attributes of sex. This principle, however, does not preclude legislation (or other official action) which . . . takes into account a physical characteristic unique to one sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not . . . deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of a average based on one sex. Hence such legislation does not . . . violate the Equal Rights Amendment."

[5] See published text of Professor Gerard's statement for list of factors and an accompanying explanation.

[6] *Geduldig* v. *Aiello* (417 U.S. 484 (1974)).

[7] *California Federal Savings & Loan Association* v. *Guerra* (34 Fed. Employment Prac. Cases 562 (C.D. Cal., March 21, 1984)).

characteristics that are unique to one sex. This so-called principle fails to provide that clarity.

Summary of Questions Directed to Professors Zuckert and Gerard

Senator Hatch questioned both professors concerning the nature of the exceptions to the requirement of equality of rights contained in the proposed amendment, with specific emphasis on the following issues:

(1) The genesis of the implied exceptions for privacy and unique physical characteristics;

(2) The constitutionality of implied exceptions to permit affirmative action and single-sex private schools and clubs;

(3) Public policies that would be affected by the unique physical characteristics and the privacy exceptions; and

(4) Modifications of the language of the proposed equal rights amendment.

(1) GENESIS OF THE IMPLIED EXCEPTIONS FOR PRIVACY AND UNIQUE PHYSICAL CHARACTERISTICS

Senator Hatch asked the panel whether these exceptions flowed naturally from the text of the Equal Rights Amendment itself or if they evolved in response to short-term political problems faced by ERA proponents. Professor Zuckert cautioned that the notion that the exceptions might have been politically motivated was not quite fair, since the *Yale Law Journal* article (in which the exceptions first appeared) was written prospectively, to explain the amendment, rather than in response to questions that arose later. It was her belief that the unique physical characteristics exception was devised because of the need to address obvious differences between the sexes, given the fact that language of the amendment required that there could be no references to "male" and "female."

Professor Gerard answered that the exceptions did not arise from the language of the Equal Rights Amendment which is absolute and unqualified. It was his opinion that the authors of the *Journal* article were anticipating objections to the amendment and so attempted to devise a rationale for rebutting these objections. He said he knew of no reason why privacy should be held to be an exception but not freedom of association or the free exercise of religion, for example.

(2) THE CONSTITUTIONALITY OF IMPLIED EXCEPTIONS FOR AFFIRMATIVE ACTION AND FOR PRIVATE SCHOOLS AND CLUBS

Senator Hatch asked the panel its opinion regarding the treatment of affirmative action programs under the ERA. Professor Zuckert said that although she believed that affirmative action programs would become unconstitutional if the ERA were ratified, others have argued that sex-based affirmative action could be allowed as a judicial or legislative remedy, as a consequence of current court interpretation of the equal protection clause, which allows suspect classifications to be used for compelling State interests. Stating that she believed the explicit language of the ERA

would supercede current court interpretation allowing affirmative action, Professor Zuckert noted that there is no absolute certainty regarding court decisions. She said that there are cases in which the Supreme Court has issued rulings that are contrary to the record regarding legislative intent. In order to guarantee an affirmative action exception, she believed that the language of the amendment should be changed.

Senator Hatch then asked the panel if it thought that other exceptions to the ERA would be allowed, given the fact that the amendment must be read in the context of the rest of the Constitution: For example, the exceptions permitting tax-exempt status for (donations to) all-male private schools and for (dues paid as a deductible business expense to) all-male clubs. Professor Zuckert said that all-male and all-female private schools would be in danger of losing their tax-exempt status.

Professor Gerard concurred with both of Professor Zuckert's statements.

(3) PUBLIC POLICIES THAT WOULD BE AFFECTED BY THE UNIQUE PHYSICAL CHARACTERISTICS AND PRIVACY EXCEPTIONS

(a) Unique physical characteristics.

Senator Hatch asked the panel to suggest public policies which could be affected by the alleged unique physical characteristics exception to the ERA. Professor Gerard responded that benefits granted on the basis of pregnancy would be affected.

Referring to the text of the *Yale Law Journal* article, Senator Hatch asked if it was correct to say that the scope of the unique physical characteristics exception is limited to physical differences and that it would not extend to psychological, temperamental, cultural, social, or other characteristics of the sexes, if such existed. Professor Zuckert answered that the unique physical characteristics test should be read according to the stated purpose of the authors of the *Yale Law Journal* article whose intention was to minimize all differentiation on the basis of sex.

Senator Hatch commented that, according to proponents of the amendment, such issues as leave for child rearing, rape laws, or prostitution laws would not be included in the unique physical charateristics exception, since persons of either sex could be involved in such activities. He asked the panel if it agreed with this interpretation of the breadth of the exception. Professor Zuckert concurred that the exception was not very broad.

Senator Hatch then asked if proponents of the amendment were also correct when they claimed that unique physical characteristics only refer to those characteristics which are found in all or some women, but no men, or in all or some men, but no women. Professor Gerard said it was his understanding that a unique physical characteristic is a characteristic that the other gender does not have at all.

(b) Privacy

With regard to the second implied exception, the right to privacy, Senator Hatch asked if it was correct to say that the scope of the right to privacy exception is different from—and is not intend-

ed to be the same as—the right to privacy declared by the Supreme Court in *Roe* v. *Wade* and other decisions. He noted that the Court first declared that privacy was protected by the Constitution concept with regard to contraception.[8] Professor Gerard answered that the privacy concept was developed almost entirely in the context of abortion. He commented that proponents argue that the ERA will not affect abortion and that the ERA will be qualified by the privacy exception, despite the lack of any case history supporting this argument. Professor Zuckert observed that both the privacy and the unique physical qualifications exceptions flow from the premise of ERA proponents that any distinctions between the sexes constitutes a denial of equality. She said that she was not convinced this was true, and that, but for this premise, the right to privacy would not be needed as an exception.

Senator Hatch asked if it was possible to predict the precise boundaries the Court might fix in accommodating privacy to the ERA. Professor Zuckert said that it is impossible to predict future Court interpretations and that the right to privacy needs clarification by Congress.

Senator Hatch asked what kind of public policies might fall within the ambit of the so-called right to privacy exception, citing the policy of separate dormitories to public universities and the military. Professor Zuckert responded by noting that the right to privacy is a court-constructed doctrine which would probably not take precedence over explicit words in the Constitution regarding equal rights. Professor Gerard said that the right of privacy, as presently defined by the Supreme Court, has centered around preventing the Government from interfering with individual choice, and that it would be constitutional to maintain separate dormitories only to the extent that individuals wish them to be maintained.

Senator Hatch asked Professor Zuckert how the right to privacy concept relates to the concept that separate but equal treatment on the basis of sex would be unconstitutional under the ERA. He noted that separate but equal treatment on the basis of race is unconstitutional under the 14th amendment. Professor Zuckert responded that some proponents of the ERA argue that the situation of the races is not the same as the situation of the sexes in this regard, and said that she agreed with this argument.

Citing a recent seventh circuit case in which he said the court concluded that the right to privacy was subordinate to the right of female prison guards to search prison inmates, even those prisoners whose religions prohibited such contact, Senator Hatch asked if such an interpretation would continue to be constitutional under the ERA. Professor Gerard answered that it would continue to be constitutional and added that there had been a number of similar lower court decisions.

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[8] See, *Griswold* v. *Connecticut* (81 U.S. 479 (1965)).

(4) MODIFYING THE LANGUAGE OF THE PROPOSED EQUAL RIGHTS AMENDMENT

Senator Hatch asked Professor Zuckert for her perspective on the following language as an equal rights amendment: "Equal protection of the law shall not be denied or abridged by the United States or any State on account of gender." Professor Zuckert answered that this language raises the question of the difference in meaning between "protection" and "rights." She said that use of this language would invite the courts to apply the doctrines that it has already formulated in interpreting the equal protection clause as it now stands. The problem with this approach, she said, is that the courts have not interpreted very well what equal protection means since there are three standards of review. She added that many of the justices in writing individual opinions have expressed dismay at the fact that they are reading the same words in three different ways. It was her opinion that this multi-standard approach to determining permissible or impermissible classifications based on sex would not last and that simply adding the words "equal protection" to the Constitution would not give the court much guidance regarding the kind of action Congress wants to endorse.

Also regarding the wording of an equal rights amendment, Professor Gerard suggested that the amendment might forbid discrimination against "women," rather than "on account of sex." Men, he said, do not need the protection of a constitutional amendment and this language would solve the problem created by the ambiguity of the word "sex" which, he noted, "can refer either to the sex you do or the sex you are." Finally, he said the problem of what is meant by discrimination against women can be defined in the Equal Rights Amendment.

THE STATE EXPERIENCE UNDER STATE EQUAL RIGHTS AMENDMENTS

INTRODUCTION

On September 19, 1984, the Senate Subcommittee on the Constitution received testimony from two witnesses regarding the State experience under State Equal Rights Amendments.

Grover Rees, a professor at the University of Texas School of Law, reviewed cases brought under State ERA's for possible implications regarding the effects of a Federal ERA.

William Kristol, a professor at the Harvard University School of Government, discussed the impact of the ERA on the scope and distribution of governmental power.

SUMMARY OF STATEMENT BY GROVER REES, PROFESSOR, UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEXAS

Professor Rees argued that cases decided under State Equal Rights Amendments do not provide guidance regarding the potential effects of a Federal ERA and expressed concern that the amendment's potential for harm, through expansive interpretations by Federal courts, could outweigh any possible benefits.

PRINCIPAL QUESTIONS IN DISPUTE BETWEEN OPPONENTS AND PROPONENTS OF THE EQUAL RIGHTS AMENDMENT

A review of cases decided under State ERA's for possible implications regarding the effects of a Federal ERA (if it were enacted) shows that there are four principal areas in dispute:

(1) Whether the ERA would eliminate many of the legal benefits and preferences that women have traditionally enjoyed;

(2) Whether the ERA would make unconstitutional certain kinds of "separate but equal" treatment for men and women by applying the strict scrutiny standard of review to classifications by sex;

(3) What impact, if any, the Federal ERA would have on the question of abortion, abortion funding and related issues; and

(4) Whether the ERA would have significant effects on the disparate economic situation of men and women in the United States.

WHY THE EXPERIENCE UNDER STATE ERA'S IS OF LIMITED PROBATIVE VALUE REGARDING THE EFFECT OF A FEDERAL ERA

There are a number of reasons why cases brought under State ERA's cannot be transferred directly from the State to the Federal level. First, the wording of the State amendments varies widely—only six or seven State ERA's have language that is substantially similar to that of section I of the Federal ERA. Second, the legisla-

tive history of the State ERA's is different from the legislative history that now exists for the Federal ERA. Third, State courts have varied widely in the standard of review applied to sex-based discrimination under the State ERA's, with only two State courts actually applying the probable standard of review under the Federal Equal Rights Amendment, e.g., the strict scrutiny standard with perhaps a limited exception for unique physical characteristics. Fourth, a number of controversial issues having to do with the Federal ERA are not State issues, the military draft, for example, and cannot be tested under State ERA's. Fifth, since State judges tend to be more conservative and more responsive to popular sentiment than Federal judges, a more expansive interpretation of a Federal ERA could be expected from the Federal courts. Sixth, the cases differ from State to State and often produce conflicting rulings. Finally, to the extent that experience under State ERA's is probative, it tends to support the claims of ERA opponents in all four areas of dispute.

(1) Laws affording preferential treatment to women

In rulings under State ERA's, courts have struck down laws in the areas of domestic relations and criminal law that afforded preferential treatment to women. For example, the presumption that it is an obligation of the husband to support his wife has been struck down in Pennsylvania and Maryland,[1] and the preference for the mother over the father in awarding child custody has been struck down in Pennsylvania, Washington, Maryland and Illinois.[2] With regard to State court rulings on sex-based criminal laws, the major area in which preferential treatment for women generally has been upheld is that of rape law, specifically statutes in which the man is traditionally defined as the offender and the woman as the victim. These laws can be defended on the ground that they recognize unique physical characteristics of men and women, but State courts have upheld them by applying the "rational basis" standard of review. Proponents of the amendment claim that the Federal ERA would require reversal of the Court's holding in the *Michael M.* case, a statutory rape case upholding the prosecution of men but not women who engage in sexual intercourse with a nonspousal partner under the age of 18.[3]

(2) Laws providing separate but equal treatment of men and women

The provision of separate but equal sports teams has been declared a violation of the State Equal Rights Amendment in Colorado, Washington, Pennsylvania, and Massachusetts.[4] In Pennsylvania, a provision allowing separate but equal public schools was struck down [5], regardless of an argument that many people

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[1] See *Nan Duskin, Inc.* v. *Parks*, Legal Intelligencer, Mar. 15, 1978, at 1 Col. 1 (Phila. County C.P. 1975) and *Coleman* v. *Maryland* (32 Md. App. 322, 377 A.2d 553 (1977)).

[2] *Commonwealth ex rel. Spriggs* v. *Carson* (470 Pa. 270, 368 A.2d 635 (1977)), *Murray* v. *Murray* (28 Wash. App. 187, 622 P.2d 1288 (1981)); *McAndrew* v. *McAndrew* (39 Md. App. 382, A.2d 1081 (1978)); *Elmore* v. *Elmore* (46 Ill. App. 3d 504).

[3] *Michael M.* v. *Superior Court* (450 U.S. 464 (1981)).

[4] *Darrin* v. *Gould* (85 Wash. 2nd 859, 540 P. 882 (1975)); *Commonwealth* v. *Pennsylvania Interscholastic Athletic Assoc.* (18 Pa. Commw. 45, 334 A.2d 839 (1974)); *Attorney General* v. *Massachusetts Interscholastic Assoc.* (378 Mass. 342, 393 N.E. 2d 284 (1979)).

[5] See *Newberg* v. *Board of Public Education* (478 A.2d 1352 (Pa. Super. Ct. 1984)).

thought might be permissible under the Federal ERA—that maintaining separate educational institutions is a question of educational philosophy that need not have anything to do with believing one sex or the other is inferior.

In another case, a Maryland court declared it unconstitutional for the State to grant a tax exemption to an all-male country club, ruling that the State's action in giving a tax exemption is equivalent to active discrimination by the State.[6] If this rationale were to be extended to sex discrimination under equal rights amendments, then countless institutions including, for example, women's colleges and many religious institutions, would face loss of their tax exemptions.

(3) Laws affecting abortion and abortion funding

In several cases the argument has been made that a State ERA requires a State to fund abortions on the same basis that it funds other necessary operations for indigents. If sex is considered a "suspect classification" under the State ERA and pregnancy is considered a sex-related condition, then the argument seems persuasive. In Hawaii and Massachusetts, the court avoided using the State ERA by applying the rationale regarding the funding of necessary operations to another statutory provision.[7] In Connecticut, the court decided the case on other grounds, but commented favorably on the argument that the State ERA required abortion funding.[8] (In these three cases, the courts upheld State funding of abortion, but did not base their decisions on the constitutional issue of whether the State ERA's mandated such a conclusion.) In Pennsylvania, the State court held that the Pennsylvania ERA mandated abortion funding if other necessary medical services for indigents were paid with State funds.[9]

(4) Effect of the ERA on the disparate economic situations of men and women

There is very little evidence in the State ERA cases that the Federal ERA will affect the problem of economic disparity between men and women. However, in any State ERA cases involving economic discrimination against women the same result probably would be obtained under the 14th amendment.

POTENTIAL EFFECT OF THE FEDERAL EQUAL RIGHTS AMENDMENT

The question is not whether we can prove exactly what the amendment would do, but whether it is likely that the benefits will outweigh the harm. Even the possibility that the amendment will be interpreted to require abortion funding, the elimination of all-girl athletic teams, and the denial of tax exemptions to private

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[6] See *Bainum* v. *Maryland* (unreported district court decision, 1984).

[7] See *Moe* v. *King* (382 Mass. 629, 417 N.E. 2d 387 (1981)); *Hawaii Right-to-Life* v. *Chang* (unpublished decision of the Circuit Court of the First Circuit, State of Hawaii, Civil No. 53567 (1978)).

[8] See *Doe* v. *Maher* (unreported memorandum of decision on motion for preliminary injunction, Superior Court, Oct. 8, 1981). The court noted that, although it was unnecessary to use the State ERA, the argument that it should be construed was "tempting and very persuasive."

[9] *Fischer* v. *Commonwealth Department of Public Welfare* (unreported opinion of Commonwealth Court. Judge MacPhail, 1984). This ruling was reversed on Sept. 24, 1984 and the case is currently on appeal.

men's and women's colleges would seem to require proponents to present strong evidence that the amendment will produce important and palpable benefits. Assuming such a showing can be made, the ideal solution is to amend the proposal so as to secure its desirable results while reducing the risk of undesirable ones.

SUMMARY OF STATEMENT BY WILLIAM KRISTOL, PROFESSOR, HARVARD UNIVERSITY SCHOOL OF GOVERNMENT, CAMBRIDGE, MASSACHUSETTS

Professor Kristol opposed the ERA, arguing that the amendment would lead to a significant transfer of governmental authority—first, from the legislative branch of the Federal Government to the judiciary; second, from the States and localities to the Federal Government; and third, from individuals and groups in the private sphere to the State. He concluded with a comment on the symbolic importance of the ERA.

TRANSFER OF GOVERNMENTAL AUTHORITY

The ERA would transfer governmental power in the following ways:

(1) From the legislative branch of the Federal Government to the judiciary

The sponsors of the ERA have been unwilling to clarify the language of the amendment to indicate how it is to be interpreted, e.g., under what standard of review, leaving this determination to the courts. Those proponents of the ERA who claim to accept a "common-sense" interpretation of the amendment refuse to incorporate any language specifying just what a common-sense interpretation is. Although the more "absolutist" proponents say they intend the amendment to mean what it says (implying review under the strict scrutiny standard), they have recourse to the "unique physical characteristics" qualification [10] that is the central feature of this impossibly absolute or impossibly vague amendment.

In proposing such an amendment, Congress invites the American people to resign into the hands of the Federal judiciary their responsibility to govern themselves in this fundamentally important sphere of relations between and distinctions among the sexes.

(2) From the States and localities to the Federal Government

In addition to shifting authority from the Federal judiciary, the ERA would shift governmental power from the States and localities

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[10] See Barbara Brown, Thomas J. Emerson, Gail Falk, and Ann Freedman: "The Equal Rights Amendment: A Constitutional Basis for Equality for Women," Yale Law Journal, vol. 80, April 1971, p. 893. The relevant passage reads: "The fundamental legal principle underlying the Equal Rights Amendment . . . is that the law must deal with particular attributes of individuals, not with a classification based on sex. This principle, however, does not preclude legislation (or other official action) which . . . takes into account a physical characteristic unique to one sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not . . . violate the Equal Rights Amendment."

to the Federal Government. Statutes relating to family law and to morals differ from State to State and from locality to locality. All this would be subject to nationalization under section 2 of the amendment.

One of the great virtues of federalism is that it permits a reasonable reconciliation of the principles of self-government and of individual rights. Self-government implies the right, at least up to a point, to create a community of a certain character with regard to such questions as whether to permit the sale of liquor or what sort of curricula to have in the public schools. The movement toward nationalizing such issues would ensure bitter national political battles in which the claim of self-government would conflict directly with that of individual rights. However these clashes might be resolved, the ERA would have damaged what remains of an important and worthwhile feature of our constitutional order.

(3) From the private sphere to the Federal Government

While it is true that the ERA purports to apply only to actions by the United States or any State, a similar provision in section 1 of the 14th amendment has not prevented the courts and Congress from obscuring the distinction between the public and private spheres. The increasing erosion of a private sphere free of government interference has been particularly evident in areas touched by the "suspect" classification of race. If adoption of the ERA were to make the standards of review for judging sex classifications the same as those for judging racial classifications, then it is not difficult to anticipate that the private choice of single-sex education or even certain patterns of religious practice could be subject to governmental intervention. Not only might organizations such as churches and private schools be forced to disengage themselves from any public connection whatsoever (such as tax exemptions, for example), but the notion of what constitutes a "public connection" could be so broadly defined that staying clear of it could become virtually impossible.

The question might be asked: Why not pursue the goals of justice and "equal rights" everywhere, including in the private sphere? The answer is that it is necessary in a free society and under constitutional government to have an understanding that there is a sphere beyond government control in which "discrimination" is tolerated. Even in the case of racial discrimination, where one can make a strong argument that fairly radical governmental intervention was required because of an unjust and dangerous social situation, most would admit that Government intervention can become too intrusive and counter-productive. However massive, intervention on behalf of sexual equality lacks the decisive justification present in the case of racial equality. Women's status has been changing as opinions have changed. Furthermore, massive intervention on behalf of sexual equality would need to run counter to the fact that the sexes are fundamentally distinct and different in a way the races are not. In the long run, such intervention would erode the fundmental premises of limited constitutional government.

THE SYMBOLIC IMPORTANCE OF THE EQUAL RIGHTS AMENDMENT

There is concern that the defeat of the ERA would be a symbolic set-back for the principle of equal rights for women, perhaps producing an impediment to further progress as well. The ERA cannot be fairly portrayed as a symbol of the "public recognition of the equal rights and status of women in the United States," however.[11] The situation would be different if our laws and customs had not changed to the degree that they have without the ERA, or if the proponents of the ERA had entertained moderating and clarifying revisions early on. The ERA proponents have always rejected revisions and thus the ERA has become a symbol, not of equal opportunity for women, but of social revolution imposed from above.

Defeat of the ERA should be seen as a symbolic reassertion of our constitutional principles of self-government, federalism, and freedom in a private sphere. At its best, such a reassertion should cause us to deepen our understanding of those principles, and to address ourselves to our current legislative practices and constitutional interpretations so as to try to bring them more into line with those principles.

SUMMARY OF QUESTIONS DIRECTED TO PROFESSORS REES AND KRISTOL

Senator Hatch asked what questions concerning appropriate criterion for a constituional amendment regarding the various details of its application, e.g., should the standard be the same for an amendment as for a statute. Professor Rees responded that an argument had been made against cluttering up the Constitution with needless detail, adding that if much detail were needed in an amendment, then perhaps it should be reduced to a statute. On the other hand, he said that specific questions have been raised regarding the Equal Rights Amendment and, given the difficulty of controlling judicial interpretation of language by means of a legislative history, an ERA without clarifying language would amount to a charter for legislating in the general area of equality between the sexes.

Professor Kristol said that it is not true that all constitutional amendments are written in general terms and that most amendments in the Constitution are quite specific, that 18-year-olds shall have the right to vote, for example.

Senator Hatch then thanked the witnesses and said he would submit further questions to them in writing.

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[11] Catherine H. Zuckert. Testimony on the Equal Rights Amendment before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, August 7, 1984, p. 14.